

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH  
CENTRAL DIVISION

PETTER INVESTMENTS, a Michigan )  
corporation doing business as )  
Riveer, )  
Plaintiff, )  
vs. ) CASE NO. 2:14-CV-45DB  
HYDRO ENGINEERING, a Utah )  
corporation, et al. )  
Defendants. )  
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BEFORE THE HONORABLE DEE BENSON

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November 21, 2014

Motion Hearing

A P P E A R A N C E S

For Plaintiff:

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For Defendant:

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801-328-3202

1 November 21, 2014

11:00 a.m.

2 P R O C E E D I N G S

3  
4 THE COURT: Mr. Mark Miller is here and Mr. Brett  
5 Foster is here representing the defendants.

6 All I have done, Ed, is call the case and said who  
7 is here.

8 Mr. Lobbin is here.

9 MR. LOBBIN: I am here.

10 THE COURT: Mr. Ford is not, correct?

11 MR. LOBBIN: No. Mr. Ford is traveling today. He  
12 would have attended otherwise, but it is just me as well as  
13 a principal of Riveer, Matt Petter, who is here with me from  
14 Michigan.

15 THE COURT: This is Mr. Petter?

16 MR. PETTER: Yes, it is.

17 THE COURT: You're welcome to sit up here at  
18 counsel table if you want, sir.

19 Do you have party representatives as well?

20 MR. MILLER: Yes. We have Alan and Jim McCormick  
21 of Hydro Engineering.

22 THE COURT: They are welcome to come to the table  
23 behind you or wherever they would like to sit. Maybe they  
24 like it there. I still don't know why they gave us four  
25 counsel tables in this courtroom. If it would have been up

1 to me, I would only have two permanent, and they would be  
2 closer together and wider. You can't put three people at  
3 those tables.

4 We're here on a whole bunch of stuff. I have  
5 three different summary judgment motions. I have a motion  
6 for 56(d) relief or discovery, and at the end I want to see  
7 if you're prepared to discuss the motion filed by the  
8 defendants regarding local practice rules 4.1 and 4.2. I  
9 think that that is the entirety of it.

10 I think it makes the most sense to begin with the  
11 summary judgment motion brought by the defendants with  
12 regard to the first claim for relief. Then we'll do the  
13 third claim for relief, and then the motion regarding the  
14 fourth, fifth and sixth claims for relief. At some point  
15 where it makes sense I will hear the plaintiff's motion for  
16 56(d) relief. They all relate.

17 If you're ready to go, Mr. Miller, and are you  
18 doing to go this?

19 MR. MILLER: Yes, Your Honor.

20 THE COURT: You may begin.

21 MR. MILLER: I have prepared some charts to help  
22 me in my argument.

23 THE COURT: Of course you did. More paper.

24 MR. MILLER: More paper.

25 THE COURT: In fairness, you warned me that you

1 would have charts.

2 MR. MILLER: I did.

3 THE COURT: I expected it.

4 MR. MILLER: I felt like I had an obligation after  
5 representing that last time.

6 THE COURT: You have them color coded. How nice.

7 MR. MILLER: I came through on my promise.

8 MR. LOBBIN: Your Honor, if I may object, I just  
9 want to note for the record that I have not seen this before  
10 just now.

11 THE COURT: Really?

12 MR. LOBBIN: I would object to their --

13 THE COURT: Did you hear him mention them in our  
14 last hearing?

15 MR. LOBBIN: As you may recall, I was in the  
16 hospital and I had trouble hearing what was going on.

17 THE COURT: I didn't hear you say you had trouble  
18 hearing. Anyway, he did mention it and Mr. Ford heard it.  
19 They are okay.

20 MR. MILLER: They are not evidence or exhibits or  
21 anything like that. They are just kind of graphical  
22 depictions of my argument.

23 Under tab 1, and that is kind of a good place to  
24 start on this motion, and just to clarify what is going on  
25 in this case, if you look at tab 1 and that time line, it is

1 important to recognize the damages period that Riveer is  
2 claiming for their infringement of the 298 patent. The  
3 patent statute allows you to seek damages up to six years  
4 prior to the complaint. If you look at this time line, the  
5 wash pad sales that they are accusing of infringement  
6 encompass the same wash pad sales that were accused of  
7 infringement in the Michigan lawsuit. Their statutory  
8 period for damages goes all the way back to May of 2007  
9 prior to the filing of the Michigan complaint.

10 That is important when we're talking about things  
11 like estoppel and claim preclusion and the Kessler Doctrine  
12 and whether these are the same wash pads. They are the  
13 exact same wash pads. They are the exact same sales  
14 transactions. It is not like we're talking about something  
15 that we sold today and are trying to compare it to something  
16 that we sold back then. They are accusing the exact same  
17 sales all the way back to May of 2007. The Michigan case  
18 ended in November of 2009, and then moving forward, there is  
19 a continuation of sales of the same wash pads.

20 This is how all the doctrines come into play. Res  
21 judicata and claim preclusion would cut off liability up to  
22 the end of the Michigan case. Then the Kessler Doctrine  
23 would kick in, the way the Federal Circuit describes it, as  
24 filling in the gaps that claim preclusion does not have to  
25 allow prospective preclusive effects. Then laches would cut

1 off everything prior to them filing the Utah complaint in  
2 2013. Then we believe that laches should also bar  
3 prospective relief in this case because of some egregious  
4 circumstances that we can get into.

5 Let's start with laches. If you go to the second  
6 tab in this binder, the laches period we have is 12 and a  
7 half years roughly. They got their patent issued in  
8 December of 2000. They knew about the Hydropad product  
9 dating back to May of 2000. So from May through September  
10 of 2000, they sent letters to Hydro Engineering saying we  
11 think your Hydropad infringes one of our forthcoming  
12 patents. There are a bunch of letters exchanged. At that  
13 point they are on notice of our products.

14 THE COURT: I assume that should say 298 patent?

15 MR. MILLER: 289 patent. Well, there is my typo.

16 That should say 298. Thank you.

17 So beginning in December of 2000, that is the  
18 laches period. They did not assert the patent for 12 and a  
19 half years. It is that simple. We have the presumption of  
20 unreasonable delay and we have the presumption of  
21 prejudicial harm. That is established by that period and it  
22 is more than double the six-year period in the Patent Act  
23 that provides for the presumption.

24 There are more egregious circumstances here other  
25 than just the delay. In a lot of laches cases you have a

1 party who just does not file suit. Sometimes they are  
2 completely silent and they don't do anything. Here, in the  
3 middle of this laches period, they actually did file suit  
4 and they asserted the parent of the 298 patent. They had  
5 the 298 patent at their disposal and they could have  
6 asserted it and they chose not to for strategic reasons.

7 Then they go through the whole litigation in  
8 Michigan and they lose on liability on summary judgment in  
9 Michigan, and then there is a settlement to avoid a damages  
10 trial, and our clients move forward with confidence that any  
11 problems with their patents at that point -- we're done and  
12 we can move forward with our Hydropad and we're done. The  
13 12-and-a-half-year delay gives us laches, and at least  
14 barring all recovery prior to the date they filed the  
15 complaint in 2013.

16 Now, if you go to tab 3, Riveer has raised some  
17 excuses for the delay, because the way the presumption in  
18 laches works is you get unreasonable delay under the  
19 presumption and you get prejudice under the presumption, and  
20 then it is Riveer's burden to come forward with evidence to  
21 demonstrate a legally recognized excuse for the delay.

22 Under tab 3 we can go through their excuses. They  
23 have raised three arguments. At the first page of tab 3,  
24 Riveer says that they were a young, small company with no  
25 experience in patent litigation and they didn't have the



1 financial resources. First, that is not really a very  
2 credible excuse, given the fact that they did file a lawsuit  
3 for patent infringement against Hydro in the middle of that  
4 laches period, and to argue that we didn't have the  
5 financial resources to add the child patent to that, where  
6 you're analyzing the same specifications and the same  
7 accused product, it is not a credible excuse.

8           Whether it is credible or not you can credit Mr.  
9 Petter's testimony and his affidavit, and this is summary  
10 judgment and you actually can take it as true and it does  
11 not work. The law is very clear that an assertion of  
12 poverty or lack of finances is never a legally cognizable  
13 excuse for laches. It never has been. That dates back to  
14 the Supreme Court decisions from decades and decades, and  
15 this first cite that I have here quotes the Supreme Court  
16 and cites to that.

17           The other thing that a claim of poverty does not  
18 do and another excuse that does not fly, which is something  
19 that they try to allege here, where they say they had no  
20 experience in patent litigation, but the Federal Circuit has  
21 said personal lack of familiarity with the patent system  
22 does not excuse a failure to file suit. So the law is very  
23 clear that excuse number one is not recognizable as a matter  
24 of law.

25           Even if it were true that they felt that they

1 didn't have the funds to add a second patent to that  
2 lawsuit, or to sue them all the way back in 2000 when the  
3 patent issued, even if it is true, it does not fly to excuse  
4 laches.

5           The second page of tab 3 is Riveer's number two  
6 excuse, the other litigation. They cite in their opposition  
7 brief, on about page 41, they cite a bunch of cases and they  
8 say laches can be excused when there is other litigation  
9 that the patent owner is dealing with. Well, the idea of  
10 other litigation refers to litigation against other  
11 infringers. There is no case or authority to support the  
12 idea that you can sue a party on one of your patents, and  
13 then use that lawsuit itself against that very party for  
14 that same product as an excuse in other litigation for delay  
15 to assert your second patent.

16           If you look at the law, every statement of other  
17 litigation says reasonable explanations for delay include  
18 attempts to enforce the patent such as filing suit against  
19 another infringer. You have got Chisum On Patents, and that  
20 is a widely recognized treatise on patent law, and he  
21 explains that an excuse that is very frequently used is  
22 other litigation, which is that they were engaged in  
23 litigating the patent against another infringer. That is  
24 the only time that excuse works. They don't have that.

25           They are actually saying, well, we sued Hydro on

1 another patent and had some other litigation with Hydro, and  
2 because of that, we didn't sue them on this patent that was  
3 totally related to that case. That is not an excuse as a  
4 matter of law.

5 Another doctrine to recognize with this other  
6 litigation excuse is typically the law requires, in my  
7 bullet point number two there, the law requires the patent  
8 owner to give the other side notice that, hey, we think you  
9 infringe and we're going to sue you on this down the road,  
10 but we can't do it now because we are involved in this other  
11 lawsuit. Riveer never did that. Riveer never told Hydro,  
12 listen, we still think you infringe our 298 patent and we're  
13 going to enforce that, but right now there is just too much  
14 going on. They didn't do that.

15 In fact, they did the contrary. They did the  
16 contrary by conducting themselves in a way to lead Hydro to  
17 believe that there is no infringement problem with the 298  
18 patent. They didn't assert it in the Michigan case. They  
19 never raised it once in letters, but they were asserting the  
20 parent. There is a reason that they asserted the 749 and  
21 not the 298. They drop that reason, the real reason in a  
22 footnote in their opposition brief on page 6, and it is  
23 footnote number five, and they acknowledge that the patent  
24 that they asserted in the Michigan case is broader than the  
25 298 patent. The scope of those claims is broader, so it

1 could arguably encompass Hydro's Hydropad system. The 298  
2 patent is far more narrow.

3 They are on about their fourth or fifth law firm  
4 here, and their counsel in the earlier cases didn't feel  
5 there was a genuine claim there and didn't bring it.

6 Their third excuse and final excuse is also one  
7 that is not legally recognized, that is that Riveer tries to  
8 say that the laches period should start at the end of this  
9 Michigan lawsuit because that is when they came up with  
10 their best theory. Well, there is no law to support the  
11 idea that the laches period begins when a party comes up  
12 with a new infringement theory. You can't have a patent and  
13 know of a product and then say, well, I don't think it  
14 infringes now, and ten years down the road I just got an  
15 idea of how they might infringe this, and now the laches  
16 period restarts because you have a better legal idea or  
17 argument. That is not supported by any authority.

18 In fact, what the law says is that the period of  
19 laches begins when they are on notice of the accused  
20 infringing activities. As long as they know we're selling  
21 the Hydropad, it starts. They have a duty to investigate it  
22 and they have a duty to determine whether there is  
23 infringement, and then they have a duty to timely enforce.  
24 They didn't do that. They were on notice.

25 They try to say that the time that we're on notice

1 of the Hydropad is irrelevant. It is not irrelevant. It is  
2 the core of laches. That is where it all begins. They have  
3 offered three excuses to get around the presumption and all  
4 three are legally null. They are not recognized in the law  
5 and on summary judgment they can't be accepted as a matter  
6 of law.

7 I think our motion has at a minimum established,  
8 as a matter of law, laches, barring any recovery of damages  
9 predating the complaint that was filed in 2013.

10 If we go back to tab 1, I also want to continue  
11 with laches in the sense that I believe in this case laches  
12 should also bar prospective recovery. There is a statement  
13 in the Supreme Court's recent case that talks a little bit  
14 about laches. I forgot the name of that case.

15 It is the Petrella case. There is a statement in  
16 the Petrella case from the Supreme Court that cites to  
17 situations where laches can also bar prospective relief,  
18 injunctive relieve, not just past damages. It says it has  
19 got to be egregious circumstances. The cases it cites have  
20 analogous circumstances. The egregious circumstances here  
21 are this 298 patent is going to expire in less than three  
22 years. There is hardly any time left on this patent. They  
23 get a 20-year period from the filing date, which was  
24 September of '97, and the patent was issued in December of  
25 2000. So they had roughly a 16 to 17 year enforcement

1 period and they sat on their laurels for like 90 percent of  
2 that period and did nothing for 12 and a half years.

3 Now if they want injunctive relief, and by the  
4 time we get to the end of this case, and let's assume, but  
5 it would never happen if we have to brief this thing on  
6 claim construction and infringement and we would prevail  
7 there, but if they could win and seek an injunction, they  
8 would take Hydro's Hydropad out of play for a period of like  
9 a year and a half, when Hydro has spent the last 15 years  
10 building its company around this product.

11 It is the core of their product line. They have  
12 built it up and they waited until they built it up and they  
13 have a huge reliance on it and their company depends on it,  
14 and then they want to enforce a patent and say you're  
15 precluded from selling that for two years now. That is an  
16 egregious result based on that delay and it is the result of  
17 that delay.

18 Another egregious circumstance is the length of  
19 their delay and actually pursuing litigation with the other  
20 patent, and now forcing a new court to come in and expend  
21 resources and looking at these same devices, the same patent  
22 systems, same specifications and a lot of the same claim  
23 limitations for the first time, and that is another reason  
24 that laches should bar prospective relief.

25 In the cases cited in the Petrella decision, the

1 injunctive relief was precluded because the plaintiff had a  
2 copyright claim against a building design, and they waited  
3 and didn't assert it until they built the building and then  
4 they asserted it, and the Court said you waited until they  
5 made all of these investments, and we're not going to allow  
6 you to get injunctive relief and tear down the building.  
7 That is what they are asking you to do. We want the ability  
8 to go tear down this business that they have built up for 15  
9 years and we sat around and watched them do it the whole  
10 time. That is why laches should bar the entire claim.

11           Beyond laches, and back to tab 1, we have claim  
12 preclusion and the Kessler Doctrine. Those two combined  
13 also bar their claim. I think the focus of claim preclusion  
14 is really what are these devices about. The question the  
15 Court raised last week is how do I know if one is different  
16 than the other or if these are the same device?

17           Well, the first thing I have told you is that they  
18 are the exact same sales. They are the exact same devices.  
19 Even the ones post the decision, they are the same  
20 structurally and they are essentially the same in the sense  
21 that any differences have nothing to do with the patent.

22           If you go to tab 4, and I think this is just some  
23 quick little education on the technology, and we have all  
24 seen wash pads and we have seen car washes. You go in and  
25 there is a big concrete floor and there is a grate.

1 Underground there would be a basin to catch everything  
2 falling off the car and all the water. That is how things  
3 used to be done.

4 If you go to tab 5, what these companies started  
5 doing in the 1990s is they would make these portable wash  
6 pads made out of steel. They are very simple in design.  
7 You have a basin, a steel basin, four walls, a bottom, and  
8 it creates a basin and then you put a grate on top. Then  
9 you pull the car up onto that and you wash it off and  
10 everything falls right through the grate and is collected in  
11 the basin. Then it can be pumped out with hoses.

12 In the 1990s that was the first style of wash pad  
13 and Riveer got patents on that style. They filed their  
14 patents in 1997 and they were issued in the year 2000. The  
15 grate over the basin style, that is what was being done in  
16 the '90s.

17 If you go to tab 6, Hydro made a system that had a  
18 basin under it and had these guardrails over the top. This  
19 was their containment wash pad. Everything fell right  
20 through and was collected in the basin. That is what they  
21 sold in the '90s. They don't sell that anymore.

22 If you go to tab 7, in the year 2000 Hydro  
23 developed the invention that is covered by its patents.  
24 This is the impervious top with a side trough system. This  
25 is a system where the top of the wash pad that the car is



1 sitting on is not a grate. Water falls on it and flows over  
2 to the edge of the wash pad and falls into a side trough.  
3 It is not collected in the basin directly below where the  
4 washing is taking place.

5 The benefit of that invention was on the grate  
6 basin type wash pads, you had to pull the car off and you  
7 had to lift up the grate to clean out the basin. Okay. In  
8 the Hydro system where you have this impervious top that  
9 flows over to a side gutter, kind of like the roof on your  
10 house, and it flows off the roof and into those gutters  
11 along your house edge, and that is what they invented, and  
12 the benefit was you could clean out that side gutter without  
13 interrupting the washing process. The car does not have to  
14 be taken off. Hydro got patents on that system.

15 When the patent office considered Hydro's patent  
16 application, they also considered Riveer's prior patents on  
17 the grate over the basin system, and they said that Hydro's  
18 system is a new invention and it is different than Riveer's  
19 grate other the basin system and they were awarded patents.

20 Now, the way that Hydro used to make them is they  
21 would take the rails and they would weld those rails onto a  
22 steel plate. They would take all these rails and they are  
23 like a cattle guard, and that is where they got the idea,  
24 and they went to a cattle guard company that put these  
25 cattle guards on the freeways, and they got that same

1 structure, but they welded those rails right onto a steel  
2 plate. That is what created the impervious top of the  
3 Hydropad.

4 If you go to tab 8, in about mid 2000, instead of  
5 using the rails welded onto the plates, they started just  
6 stamping the impervious top, and they would get a sheet of  
7 metal and they would stamp it so it was corrugated. It was  
8 just a single piece of corrugated steel. Then that would be  
9 placed on the support frame instead of the rails welded onto  
10 a plate.

11 A better way to show that, and I'm a little  
12 duplicative, but if you go to tab 12, tab 12 is a better  
13 depiction of Hydro's very first Hydropad design in 2000.  
14 That is what is depicted in the figures of their patent.  
15 You take the rails and they weld them right onto those  
16 plates, and that is how the impervious top was made. In tab  
17 13 the impervious top was made by just taking a single piece  
18 of steel and stamping it into that corrugated pattern so  
19 that you have the little grooves that would collect the  
20 stuff and channel it to the edge to fall into the side  
21 trough. Those are the changes. That change happened about  
22 in mid 2000. Those changes are not relevant.

23 If you go to tab 14, this is where Riveer loses  
24 their argument on claim preclusion. They admit in sworn  
25 interrogatory responses that their infringement allegations

1 in this case apply equally to the pads we sold in 2000 and  
2 to the pads that we sold in 2007 and to the pads that we  
3 sell today. They admit that. They said since 2007, and  
4 this is Riveer's statement in its interrogatory response  
5 which is binding, Hydro's wash racks exhibit the same grate  
6 basin modular wash rack design covered by the 298 patent.  
7 Since 2007 it has been the same they are arguing, but look  
8 at the next sentence.

9 This is their theory of infringement. They want  
10 to argue that we simply collapse the grate and the basin  
11 together and call it an impervious structure with upper and  
12 lower portions. That quote of impervious structure with  
13 upper and lower portions comes from Hydro's patent  
14 application that depicts the structure they sold in the year  
15 2000, the very first Hydropad. Their whole theory of  
16 infringement rests on analyzing the first embodiment of the  
17 Hydropad where you weld the rails onto the steel plate.

18 In their arguments of infringement they admit  
19 there is no difference between the Hydropad in 2000 and the  
20 Hydropad today as far as the 298 patent is concerned. That  
21 is how there is no dispute of material fact here. It is  
22 admitted by Riveer that infringement applies to all of them.  
23 They don't have a unique or novel theory for a wash pad we  
24 sell today that they claim is not applicable to the wash  
25 pads that we sold in 2000 or the wash pads we sold in 2007.

1 It is all the same. Because of that and because it is the  
2 same accused product, there are no differences that make any  
3 material difference regarding the 298 patent claims and  
4 because of that claim, preclusion applies. Claim preclusion  
5 applies to bar recovery for all wash pad sales up to the end  
6 of the Michigan lawsuit in 2009.

7 Then the Kessler Doctrine kicks in. What does the  
8 Kessler Doctrine say? The Kessler Doctrine is a doctrine  
9 that --

10 THE COURT: While I'm thinking about it, can you  
11 tell me, and maybe you don't want to, but can you tell me  
12 what the novelty of the 298 patent was? Why did they get a  
13 patent, the 298 patent especially, that is different from  
14 the 792 patent?

15 MR. MILLER: The 298 patent and the 792 patent,  
16 those are companion patents.

17 THE COURT: I understand that. What did the 298  
18 patent have that was novel --

19 MR. MILLER: Okay.

20 THE COURT: -- and that was different that allowed  
21 it to get its own patent?

22 MR. MILLER: Why are the claims in that one  
23 different from the claims in the 792?

24 THE COURT: No. Well, that might help answer the  
25 question, but my simple question is what was novel about the

1 298 that got it a patent?

2 MR. MILLER: First of all, we don't think their  
3 patent is novel at all because we have invalidity defenses.

4 THE COURT: What then impressed the patent office  
5 to give it a patent?

6 MR. MILLER: Well, the way that the 298 patent and  
7 the 792 patent are written, the specifications are  
8 identical. They are disclosing the same invention. The  
9 only difference between the two is how they are claimed.

10 THE COURT: What does the 298 claim that the 792  
11 does not?

12 MR. MILLER: The 298 actually claims it more  
13 narrow than the 792. The 298 claims a basin, it says four  
14 walls --

15 THE COURT: The 792?

16 MR. MILLER: No. This is the 298 that is asserted  
17 in this case. You have four walls --

18 THE COURT: Four walls is not novel.

19 MR. MILLER: It is not novel. Then they add --

20 THE COURT: Nor is gravity.

21 Move on.

22 MR. MILLER: A bottom surface that forms a basin,  
23 and nothing novel yet --

24 THE COURT: Nothing novel yet.

25 MR. MILLER: -- and a grate that goes on top of

1 that basin, and then a drainage fitting in the basin that  
2 would allow evacuation of anything collected in the basin.  
3 That is what it claims.

4 THE COURT: That is what I thought the 792  
5 claimed.

6 MR. MILLER: Well, the way the 792 patent claims  
7 it, it is broader. They claim just a wash rack that is  
8 connected to a filtration system through a drainage fitting.  
9 The 298 patent describes the wash rack with more narrow  
10 detail by saying it has to be a basin with a grate on the  
11 top of it and things like that.

12 The novelty, and I think in the '90s people are  
13 making these wash racks, and it is not a permanent, in  
14 ground system, a concrete system, and if you think of big  
15 equipment rental companies that rent construction equipment,  
16 they need to wash something sometimes, and --

17 THE COURT: I understand the general concept.  
18 Your whole premise here on your motion for summary judgment  
19 rests on the fact, I think, that they sued you in 2007 for  
20 infringing the 792 patent, and that they surely knew enough  
21 about what we were doing and if they thought we were  
22 infringing the 792 patent, they should have also sued us for  
23 infringing the 298 patent and that would have all gotten  
24 taken care of back then.

25 MR. MILLER: Right.

1           THE COURT: The end of the suit was we were not  
2     infringing the 792, and now their cause of action is on the  
3     298, and, whatever it is, the first cause of action, so that  
4     is why my question. There has to be some difference, and  
5     that is what Mr. Lobbin is going to have to show me is that  
6     there is enough difference between the 298 and the 792 to  
7     justify waiting seven years or six years before they decide  
8     to sue your client for infringing the 298 patent. I have  
9     just never yet in the briefing understood what made the 298  
10    novel over the 792.

11           MR. MILLER: Your Honor, there is --

12           THE COURT: You say it in your brief, too, that it  
13    is a tighter claim, but I have never quite understood it.  
14    The one thing about patent law that always intrigues me is  
15    that its premise is that the whole world is supposed to know  
16    what made something new and novel so that they don't do it.  
17    Often when I ask patent lawyers what is novel about this, I  
18    don't get a very quick or clear answer.

19           MR. MILLER: Your Honor, there is nothing  
20    different between the 298 and the 792 that would justify  
21    their delay, but I can tell you the reason they didn't  
22    assert it back then and they are asserting it now has  
23    nothing to do with that it is a stronger claim or that the  
24    claim somehow has matured and now it is timely.

25           The difference is that the 298 patent claims the

1 wash rack with a grate. It requires the basin and grate  
2 design. The 792 didn't do that. That is why their counsel  
3 in Michigan asserted the 792, because our wash pads don't  
4 use a grate and basin design. They have an impervious top  
5 and a side trough, and so they didn't assert the 298 back  
6 then because it is narrower and it requires a grate. The  
7 infringement argument is almost impossible.

8 The reason they filed this claim is similar to why  
9 they filed the first one and it is for a leverage purpose.  
10 We are in a big trade secrets lawsuit against them in front  
11 of Judge Shelby, and they want something to have leverage in  
12 settlement negotiations, so let's throw this stale, weak  
13 patent claim at them and see if that creates leverage.

14 THE COURT: In the Michigan case, if you can tell  
15 me simply, what was their theory of infringement? You claim  
16 you have that side trough and they didn't, or that that  
17 didn't infringe, clearly didn't infringe, right?

18 MR. MILLER: Well, the 792 patent, I give it to  
19 them that the 792 patent had a stronger infringement claim  
20 because it just said a wash rack. You could construe that  
21 broadly perhaps. Our claim construction argument was that  
22 wash rack had to be construed to require a grate. The court  
23 didn't even reach that limitation to win. Their claims in  
24 the 792 also required a vacuum pump in the filtration system  
25 and we didn't use a vacuum pump. That was the easy button



1 that the court used in Michigan, no vacuum pump.

2 There is an easy button here on noninfringement,  
3 we don't have a grate. We don't have a basin with a grate.  
4 They have not even explained how that could possibly happen.  
5 The only allegations they have made relate to the design  
6 that is shown in our patents which existed in 2000.

7 THE COURT: But you didn't have a basin with a  
8 grate in the 2007 case in Michigan either?

9 MR. MILLER: No.

10 THE COURT: But you didn't get there, because you  
11 had an easier way to show noninfringement because of the  
12 vacuum pump?

13 MR. MILLER: Well, that is true on infringement,  
14 but we did get to that point on invalidity, because the  
15 interesting thing here is although they didn't assert their  
16 298 patent for infringement against us in Michigan, they did  
17 raise it as prior art against our patent.

18 THE COURT: On an invalidity claim by them about  
19 your patent?

20 MR. MILLER: Yes.

21 There was a lot of analysis comparing their  
22 disclosure of the grate over a basin system versus our  
23 patent that claims the impervious top and side gutter.  
24 There was a lot of argument that this grate over the basin  
25 essentially, if you put the grate really close to the bottom

1 of the basin, it is kind of like an impervious top if you  
2 just put them together. All of those arguments were made in  
3 an invalidity context, and we won that on summary judgment  
4 with the Court saying an impervious top is not the same, and  
5 your patent does not disclose an impervious top. It  
6 discloses a grate, which is porous, over a basin.

7 THE COURT: I assumed generally that impervious  
8 meant solid or not leaking?

9 MR. MILLER: Yes. It meant the water does not  
10 pass through, and the portion of the wash rack at the top of  
11 the frame where the car sits, it does not go through. It  
12 goes through the side.

13 THE COURT: You used a big word. You used a  
14 four-syllable word.

15 MR. MILLER: I will try to use shorter words.

16 THE COURT: I mean in the patent. It must have  
17 said impervious in --

18 MR. MILLER: Yes.

19 We're so used to that word from all of this  
20 litigation, and impervious topside trough is kind of the  
21 short language for Hydro's patented design.

22 THE COURT: And you would like to deliver an  
23 impervious argument.

24 MR. MILLER: That is right, I would. I believe we  
25 have.

1           THE COURT: I am not even sure that is true. I  
2 mean, I am not sure what that means and I just said it.

3           MR. MILLER: If you go to tab 15, and at tab 15 I  
4 want to just quickly address the idea of the Rule 56(d)  
5 motions. Rule 56(d) is a mechanism to ask the Court to  
6 defer ruling pending further discovery. Well, in this case  
7 they have effectively got that granted to them, because when  
8 they filed these motions, they filed these motions four  
9 months ago, and in one case four and a half months ago. We  
10 are just over a week out from the end of discovery.

11           Now, in that four-month period have they tried to  
12 supplement the summary judgment record with any evidence,  
13 with any documents, with anything that would further support  
14 their opposition to these motions? They have not, not one  
15 piece of paper. There is not one thing in the evidentiary  
16 record that they have tried to supplement during that period  
17 of time that they could have been pursuing what they want.  
18 If you look at their Rule 56(d) motions, they don't say  
19 anything specific. They don't specifically say this is the  
20 fact we expect will come from this source and this is how it  
21 will support our opposition.

22           They just say there are more witnesses to talk to  
23 and there may be more documents and we expect that they may  
24 support our arguments. They are not specific. The law in  
25 the Tenth Circuit is clear that you can't just state that

1 discovery is incomplete without specificity to rebut summary  
2 judgment motions. Rule 56(d) does not compel the Court to  
3 hold off on ruling to a party that has been dilatory in  
4 conducting discovery.

5 Now, I have not seen any argument by them that  
6 there is a reason to deny this motion because of evidence  
7 that they think is out there, specific evidence and how it  
8 will come into play. They have to do that in order to defer  
9 a ruling.

10 On the res judicata or claim preclusion, I think  
11 it is clear that these are essentially the same product.  
12 These are the same claims. They are accusing the same  
13 system of infringing the patent. That patent is a child  
14 patent of the one they asserted in the first case. It  
15 absolutely should have been brought there. There are cases  
16 we have cited in the record that have precluded a patent  
17 infringement claim against a patent that was not asserted in  
18 the first case.

19 THE COURT: They claim that you have made a lot of  
20 changes to your system since that Michigan case.

21 MR. MILLER: Well, these are the changes they  
22 cite. They cite, hey, the space between the rails, those  
23 little groove areas, and if you look at tab 13, again, you  
24 see the little groove areas on that top plate, that  
25 corrugated or angulating plate, the spacing between those

1 has altered over time by a few inches.

2           You can't just say there have been changes. That  
3 is not the doctrine. The doctrine is have there been  
4 material changes that relate to the claims in the patent?  
5 What they have not done is they have not explained how any  
6 of these changes actually relate to their ability to prove  
7 infringement. They have to say because of those changes we  
8 can prove infringement now and we couldn't back then. That  
9 is not the argument they made. In fact, their interrogatory  
10 response that I pointed to earlier proves the contrary.  
11 They say that the wash pads back in 2007, they say those are  
12 the infringing product, every bit as much as the wash pads  
13 today.

14           The other changes that have been talked about is  
15 we painted them with different paint coatings, things like  
16 that. These are not significant changes that have anything  
17 to do with the structure as it applies to the claims of the  
18 patent. They have not alleged that specifically. They  
19 can't just say there have been changes made and avoid the  
20 summary judgment. There is not a disputed issue of fact on  
21 that. I have not seen an explanation of how the width  
22 between those could apply to the patent or could make their  
23 claims stronger.

24           THE COURT: Well, if you can wrap it up, and we  
25 have got a lot to do, and it would help me most to hear Mr.

1 Lobbin as soon as I can get to him.

2 MR. MILLER: Should we do the other two summary  
3 judgment motions later and he can argue this one now?

4 THE COURT: Yes.

5 MR. MILLER: Okay. Then I think I am done.

6 THE COURT: Mr. Lobbin, please.

7 MR. LOBBIN: Thank you, Your Honor.

8 May it please the Court, there are a lot of  
9 questions that Your Honor asked and I want to address those  
10 first. Before I do, preliminarily, we think that as a  
11 fundamental matter of procedural law and good jurisprudence,  
12 that a summary judgment motion brought so prematurely just  
13 procedurally does not give what Rule 50 says J.M.O.L.  
14 motions must give, which is that before facts may be  
15 determined, a party needs to be fully heard on an issue.

16 Secondly, there must be a finding that based on  
17 the evidence presented on the motion, a reasonable jury  
18 would not have a legally sufficient evidentiary basis to  
19 find for the non-movant, Riveer. Mr. Miller made reference  
20 to the fact that we have not supplemented the record. We  
21 would be happy to. We have lots of discovery since the  
22 motions were filed that further bolster our position in  
23 opposition to these motions, and many facts that we didn't  
24 have then on which a jury would be able to grant it. In  
25 looking at the entire record, a reasonable jury would

1 certainly be able to find in our favor on these issues,  
2 issues which the Tenth Circuit in the Jacobsen case has  
3 said, look, laches is an issue that is particularly  
4 inappropriate for summary judgment. These are very  
5 factually intensive issues, and certainly to grant summary  
6 judgment before a party has been fully heard is  
7 fundamentally, as a matter of procedure, not appropriate.

8 THE COURT: Could you give me just an example?  
9 Give me one of these facts that you claim you could  
10 supplement the record with if you had wanted to and that  
11 would allow a jury to reasonably rule in your favor.

12 MR. LOBBIN: Certainly.

13 On the unreasonable delay issue, we have put in  
14 the declaration of Mr. Petter which must be credited,  
15 because the facts must be construed in the light most  
16 favorable --

17 THE COURT: I have that.

18 MR. LOBBIN: Right. That is not a new one.

19 Mr. Petter explains what the delay is. Those  
20 facts are subject to corroborating facts from Hydro which --

21 THE COURT: I have those. You said that you could  
22 supplement the record.

23 MR. LOBBIN: Once we take the deposition of Hydro  
24 on 30(b)(6) --

25 THE COURT: I thought you already had.

1 MR. LOBBIN: Well, they --

2 THE COURT: I thought you were saying that you had  
3 facts that you could have brought forward.

4 MR. LOBBIN: Yes.

5 THE COURT: But you don't know what they are yet?

6 MR. LOBBIN: No. There are documents in the  
7 record that show all of these changes to their designs over  
8 time, and --

9 THE COURT: Can you give me one? Do you still  
10 need to discover them?

11 MR. LOBBIN: No. I have them in my office, but I  
12 just didn't prepare to --

13 THE COURT: Well, off the top of your head you  
14 don't know?

15 MR. LOBBIN: No, I don't have them with me. I was  
16 addressing these motions as of the date they were filed, but  
17 certainly if we want to supplement the briefing I would be  
18 happy to do that.

19 Your Honor asked about the 298 patent versus the  
20 792 patent, and I think that is a key issue to understand  
21 the course of events. They have got their perspective on  
22 the course of events and our perspective is, look, as Mr.  
23 Miller admits, the 792 patent is a broader patent. It  
24 claimed a wash rack with vacuum pump and a filtration  
25 system. That patent was asserted in 2007 because it was a



1 broader patent. Infringement was more clear. It didn't  
2 require what the 298 patent requires, which is a rack with a  
3 grate, a basin to catch water, and that water being filtered  
4 off the rack so that the rack could be cleaned without  
5 stopping the process of whatever you were doing on the rack.  
6 The prior art was in ground wash pads where you had to stop  
7 doing the washing and clean the pads and then continue the  
8 process.

9 The invention was, no, let's set up the grate and  
10 have the basin, angle it a little bit, put a trough on the  
11 side, draw the water out of the trough and filter it through  
12 and recycle it back, and you can do all that cleaning while  
13 you're still engaged in the wash process.

14 The 792, as Mr. Miller admits, is a broader  
15 patent. That is why we asserted it. The basis that the  
16 Michigan court found for noninfringement was they don't have  
17 a vacuum pump. They have a pump, it is just not a vacuum  
18 pump. So the fact of noninfringement in the Michigan case  
19 says nothing about some alleged noninfringing status of the  
20 products at issue vis-a-vis the 298 patent.

21 THE COURT: Why would you not bring the 298 patent  
22 infringement claim then?

23 MR. LOBBIN: Because it was a narrower patent, and  
24 it --

25 THE COURT: Why wouldn't that make it even more

1 likely to be brought then?

2 MR. LOBBIN: Well, because a broader patent has a  
3 wider scope so it envelopes more infringement. Their  
4 infringement at that time in our view in bringing the 792  
5 was clearly within that wide scope, whereas the narrower 298  
6 patent was not so clearly infringed. We didn't believe it  
7 was infringed until --

8 THE COURT: Why not?

9 MR. LOBBIN: -- until their products changed  
10 and --

11 THE COURT: What changed to make you think it was  
12 infringing?

13 MR. LOBBIN: Well, the grating on the product  
14 changed and it became more of a grate with the tighter  
15 spacing between the rack portions of the product, and it  
16 made it more in the definition of what the patent calls a  
17 grate, and we'll have to get into those issues in claim  
18 construction.

19 THE COURT: Well, I would like to hear them now.  
20 Can't you tell me how that made it essentially the same  
21 thing?

22 MR. LOBBIN: Well --

23 THE COURT: For the requirement here for laches,  
24 and he is telling me that we have essentially the same  
25 thing, and you tell me we don't have essentially the same

1 thing because there were changes made.

2 MR. LOBBIN: Right.

3 THE COURT: I would just like to know what they  
4 are.

5 MR. LOBBIN: Well, at the time the motion was  
6 filed and we had to brief this issue, we went into the  
7 changes that we knew about then, and we have since developed  
8 further evidence.

9 THE COURT: What are they, just the narrower  
10 spacing --

11 MR. LOBBIN: The narrowing of the grating and --

12 THE COURT: -- and the angulating ridges or --

13 MR. LOBBIN: Correct.

14 We can see, if we go through their own exhibits,  
15 and they have tab 7 where they talk about a 2000 product,  
16 and then the next tab, tab 8, talks about 2005 to the  
17 present. So you can see that the grating on these and the  
18 spacing between those steel rails has narrowed  
19 significantly. That is more of a grate in our view.  
20 Particularly what they --

21 THE COURT: Is pervious a word? I know impervious  
22 is. Does it make a grate in the sense that something can  
23 drop through it?

24 MR. LOBBIN: Not in our view.

25 THE COURT: Okay.

1 MR. LOBBIN: Well, the --

2 THE COURT: I thought that would be your view.

3 MR. LOBBIN: No. In our view the patent requires  
4 a grate and basin.

5 THE COURT: Right. A basin because something is  
6 going to drop through the grate?

7 MR. LOBBIN: It can fall through the grate, but  
8 the grate and the basin, as their products have done, might  
9 be right on top of each other so that --

10 THE COURT: It is impervious.

11 MR. LOBBIN: Sure.

12 THE COURT: Where is the basin, just out of  
13 curiosity?

14 MR. LOBBIN: The basin would be where the water  
15 travels when it goes into the lower elevated portions of the  
16 surface.

17 THE COURT: Is there a difference then between a  
18 grate and a basin if it is impervious? I am no physicist,  
19 but doesn't the water just hit and then move down to the  
20 trough?

21 MR. LOBBIN: Yes.

22 THE COURT: Okay. You think that their apparatus  
23 has a grate and a basin?

24 MR. LOBBIN: Yes.

25 THE COURT: Okay.

1 MR. LOBBIN: Principally not only were the designs  
2 changed, but Hydro argued in the prior Michigan case that  
3 no, no, no, you don't have to have a separate surface here  
4 for a grate where the vehicle rests and a separate surface  
5 down here for where the water is channeled. This is their  
6 argument in the Michigan case, which we are going to hold  
7 them to here, because they are precluded from arguing  
8 inconsistently, and they said no, it does not have to be  
9 separate. It can be one structure with upper and lower  
10 portions, the upper portion where the vehicle rests and the  
11 lower portion where the water drains.

12 Well, hallelujah. All of a sudden infringement of  
13 the 298 was abundantly clear through their representations  
14 to the Michigan court.

15 THE COURT: Wouldn't that have also been  
16 infringing the 792?

17 MR. LOBBIN: No, because the 792 has a vacuum  
18 pump, and the issue there --

19 THE COURT: In that way --

20 MR. LOBBIN: In that way, yes.

21 If we wanted to relitigate the 792 patent, I  
22 suppose we could do that excluding the fact that, but for  
23 the fact that the 792 requires a vacuum pump, which as I put  
24 in our brief the judge in Michigan explained why he felt  
25 that on summary judgment there was not sufficient evidence

1 to say that their pump was a vacuum pump, and --

2 THE COURT: Does the 298 require a vacuum pump?

3 MR. LOBBIN: No.

4 THE COURT: Well, how do you recirculate the  
5 water?

6 MR. LOBBIN: They are different kinds of pumps.  
7 The issue before the Michigan court was, yeah, they have a  
8 pump, but we are not quite sure it is a vacuum pump, and so  
9 the court granted summary judgment. There are many  
10 different kinds. There are sump pumps and --

11 THE COURT: The 298 patent didn't require a pump,  
12 the same pump that the 792 apparatus had?

13 MR. LOBBIN: The 298 patent has a pump, it is just  
14 not limited to a vacuum pump. So in reference to that --

15 THE COURT: It is broader than the 792 patent?

16 MR. LOBBIN: Well, on that limitation. Overall we  
17 agree with Mr. Miller that the 298 patent --

18 THE COURT: Tell me again why you needed the 298  
19 patent. It is a child of the 792 patent, right? Or the 792  
20 patent is its parent?

21 MR. LOBBIN: Yes. So in another lifetime I was  
22 actually a patent prosecution attorney, and I no longer do  
23 that, so I had to go through the certification process --

24 THE COURT: Well, that just might make this  
25 easier.

1           MR. LOBBIN: I am going to have to dig into that  
2 history and say that in patent prosecution normally, which  
3 is what happened here, you file a disclosure and then you  
4 have different claim sets. Let's use this claim set to talk  
5 about the vacuum pump. Let's use this claim set to talk  
6 about the structure of the grate and the basin. Let's use  
7 this other claim set -- what the patent office does is they  
8 split those out into separate applications, principally,  
9 frankly, for revenue purposes. They get another filing fee  
10 and you get to prosecute this patent and --

11           THE COURT: This is a long ways from my question.

12           MR. LOBBIN: Well, the point was that these claims  
13 were split out. The ones directed to the parent were the  
14 broader claims, and the claims directed to the grate and  
15 basin design were the narrower claims that issued in the  
16 child. There was no grand strategy, other than to get  
17 claims of different scope directed to different aspects of  
18 the inventions.

19           THE COURT: Is it possible to tell me what made  
20 the 298 patent novel?

21           MR. LOBBIN: Yes.

22           As I said before, the 298 patent was directed to  
23 the ability to no longer have to stop the washing process to  
24 clean the wash pad, and to have a mobile wash pad that you  
25 can set up and use, relocate, transport somewhere, and --

1 THE COURT: How is that different from the 792  
2 patent? Didn't the 792 patent also do everything that you  
3 just told me?

4 MR. LOBBIN: Yes.

5 THE COURT: Okay. What was different about the  
6 298 patent?

7 MR. LOBBIN: They are not necessarily  
8 independently novel. The 298 is not novel over --

9 THE COURT: You don't need novelty or whatever the  
10 word is, and I don't even know the appropriate word, but you  
11 need to have something that is different --

12 MR. LOBBIN: Than the prior art.

13 THE COURT: -- than was ever done before in the  
14 prior art, right?

15 MR. LOBBIN: Right.

16 THE COURT: We at least agree on that?

17 MR. LOBBIN: Yes.

18 THE COURT: What was it?

19 MR. LOBBIN: The 298 patent and the 792 were both  
20 novel over the prior art, not over each other. So the 298  
21 patent --

22 THE COURT: The 298 patent was not novel over the  
23 792 patent?

24 MR. LOBBIN: No, because they are not prior art.

25 THE COURT: Then how did you get a patent?



1 MR. LOBBIN: Well, they are not prior art to each  
2 other.

3 THE COURT: Okay.

4 MR. LOBBIN: The 792 was directed to the novelty  
5 of the wash rack with a vacuum pump. The 298 patent was  
6 directed to a wash rack having a particular structure  
7 recited in the claim.

8 THE COURT: Recited in the claim?

9 MR. LOBBIN: Well, that is the rack, the grate,  
10 the basin underneath the grate, and the orientation of the  
11 basin such that the water is taken off the rack into the  
12 trough, and then the pump and the filtration apparatus to  
13 clean and recycle the water.

14 THE COURT: Based on that answer from you, which  
15 I'm sure is accurate, why doesn't that make his argument  
16 almost better than he made it? You are saying these two are  
17 novel over the prior art, and you're claiming that their  
18 invention infringes it, this new thing that has been  
19 created, and because the patent office for some reason wants  
20 to get another filing fee, that they somehow induce you to  
21 make two patents rather than it could have been just one,  
22 and maybe it is for having more breadth in the one or  
23 whatnot, but why wouldn't your statement just now cause me  
24 to grant his motion?

25 MR. LOBBIN: Well, because of the fact that there

1 were two patents.

2 THE COURT: You can just sue under one --

3 MR. LOBBIN: Yes.

4 THE COURT: -- even though they were sort of a  
5 combined thing that made something novel, which allowed you  
6 to clean out the dirt without having to pull the car off?

7 MR. LOBBIN: So they are independent patents and  
8 each independent patent is an independent right.

9 THE COURT: Nobody is disputing that, but he is  
10 saying you should have sued us on both of them a long time  
11 ago.

12 MR. LOBBIN: I understand.

13 THE COURT: You knew then as well as you know now,  
14 and I know Mr. Petter submitted a declaration on this, but  
15 he says that no reasonable jury could believe that they  
16 didn't have as much knowledge then about why their product  
17 was infringing the 298 patent as they have now. You have  
18 essentially acknowledged that by recognizing in your  
19 interrogatory answer that in 2000 they were making an  
20 infringing product.

21 MR. LOBBIN: No, that is not the import of that  
22 interrogatory response. Respectfully --

23 THE COURT: You don't think that their product was  
24 infringing from 2000 to 2005?

25 MR. LOBBIN: No. We didn't assert infringement

1 and we didn't think there was infringement, which is why we  
2 didn't bring it in the first case. We brought the 792 --

3 THE COURT: No, not in that case, in this case.  
4 In this case right now is it your contention that their  
5 product that was being made and sold between 2000 and 2005  
6 was infringing the 298 patent?

7 MR. LOBBIN: No. We don't assert that and we  
8 can't assert that. We filed a lawsuit in 2013 that goes  
9 back six years under the patent statute.

10 By the way, and as an aside, Mr. Miller mentioned  
11 the Petrella case, and I know that Hydro filed a notice of  
12 supplemental authority, and I just want to add to that, if I  
13 may, and bring the Court up to speed to the extent it is not  
14 aware of what is going on at the Federal Circuit.

15 There have been two petitions for en banc review  
16 at the Federal Circuit to basically review the Petrella  
17 decision, which was under copyright law, and decide whether  
18 that Petrella decision from the Supreme Court is also  
19 applicable to patent law. What that would do would say --  
20 and the Federal Circuit is considering whether to hear that  
21 en banc -- it would say, well, the same reasoning from the  
22 Supreme Court in Petrella applies to patent law, which would  
23 say that the patentee is not subject to laches because the  
24 patentee by statute can only go back six years, so if they  
25 filed suit in 2013, you are basically alleging infringing

1 products that are from 2007 to 2013, and anything that  
2 happened before that is not subject to a finding of laches.

3 It may be a reason to withhold a decision on this  
4 motion to see what the Federal Circuit does and what the  
5 Supreme Court does with the Petrella decision and it may  
6 not.

7 THE COURT: I received the supplemental authority  
8 submitted by Mr. Miller.

9 Did you give me anything?

10 MR. LOBBIN: You know, I read the local rules and  
11 I felt like it was not --

12 THE COURT: I am not saying you had to, I just  
13 didn't want to have missed it. They gave me something about  
14 the Petrella case, but you didn't submit anything?

15 MR. LOBBIN: No, because there really hasn't been  
16 a decision yet. I could have sent you the briefs arguing  
17 for the applicability of Petrella to the Patent Act, but it  
18 is just at the briefing stage and the Federal Circuit has  
19 not made a decision yet. I did want to appraise you of  
20 that.

21 Here is what a jury should be entitled to consider  
22 at trial on this laches issue. They should be entitled to  
23 consider that Riveer had two patents, and we both agree that  
24 the 792 was broader than the 298, and in 2007 they filed  
25 suit and they had a decision to make. Do we think they

1     infringe the 298? Do we think they infringed the 792? What  
2     they decided was, well, naturally the 792 is a broader  
3     patent, so surely it is going to encompass more infringement  
4     and so, yes, there is definitely a basis to assert  
5     infringement of the 792 patent. That is why they asserted  
6     it.

7             Ultimately the Court said, well, no infringement  
8     because the pump that they use is not the vacuum pump that  
9     is claimed in the patent. Okay. That is fine. Later in  
10    the case, in 2011 Hydro got summary judgment by promising to  
11    the Court and representing to the Court in that case that  
12    no, no, no, you don't have to have a separate grate and a  
13    thing down here that catches the water. No.

14            You can have the one surface that has upper and  
15    lower portions and that is the same thing. Why did they  
16    need to make that argument? Because the accusing infringing  
17    products of Riveer were distinguishable from the idea of  
18    having those things separated. So once we saw that argument  
19    and saw it succeed, all of a sudden the 298 patent became  
20    much more -- with a consistent argument it was obvious that  
21    the 298 patent was also infringed, because what Hydro had  
22    done with the product, besides the changes to the grating  
23    and the fact that they took their side trough and attached  
24    it to the rack, they --

25            THE COURT: The light went on in --

1 MR. LOBBIN: The light went on.

2 THE COURT: -- in, what, 2008?

3 MR. LOBBIN: 2011.

4 THE COURT: '11.

5 MR. LOBBIN: 2011. The light went on and we  
6 realized, wait a minute --

7 THE COURT: They didn't make that argument until  
8 at the very end of the process?

9 MR. LOBBIN: At the summary judgment stage.

10 THE COURT: Not earlier?

11 MR. LOBBIN: No.

12 THE COURT: These things take time, but --

13 MR. LOBBIN: I was not involved in the Michigan  
14 case. In my brief I know I said 2011, so I must be citing  
15 something there, but --

16 THE COURT: Well, just out of curiosity, why did  
17 it take until 2013 to get around to suing them for it?

18 MR. LOBBIN: Well, because we were trying to  
19 settle the other case, frankly.

20 THE COURT: Well, that is only two years.

21 MR. LOBBIN: With their arguments, infringement  
22 became clear because we realized, wait a minute, what Hydro  
23 has been doing with their new wash rack design is that they  
24 have taken one piece of sheet metal or whatever, and they  
25 have stamped out the valleys, and they have left the ridges

1 up top where the grating is to hold the vehicle, and their  
2 argument is that it is only one piece of metal so it can't  
3 have a separate grate and a basin.

4 What they said in the Michigan case was that that  
5 was not important. It can be one piece of metal with upper  
6 and lower portions. All of a sudden it is like the light  
7 went on and we said, well, they have to be held to that, so  
8 they are going to infringe the 298 patent, and, therefore,  
9 we brought this suit.

10 The other two patents were brought because they  
11 are brand new patents. That story told at trial to a finder  
12 of fact, you know, with the new evidence that we have  
13 developed in discovery is something that at the very least  
14 the jury should be entitled to consider.

15 THE COURT: Well, then why would it matter if they  
16 have made any changes to their product?

17 MR. LOBBIN: Well, because that just further  
18 emboldens the fact that the infringement case did not become  
19 apparent to Riveer until they made the argument in the  
20 Michigan case and they made the changes to the wash rack.

21 THE COURT: Making the corrugations closer?

22 MR. LOBBIN: Tighter.

23 It is within the claim term of grating, and we  
24 have to establish that the term grate, g-r-a-t-e, in our  
25 patent is represented by what their products are. With the

1 design changes that argument became more clear for us.

2 Also, they brought the side trough where the water  
3 drains off to the side, and in prior iterations it was a  
4 separate piece, and they brought that into the singular  
5 piece of the wash rack. Now it is one item. It is one  
6 apparatus. Rather than going for some sort of contributory  
7 infringement theory based on the way they use it, now it was  
8 much more clear that this is all part of the same structure,  
9 the claim in the 298 patent, and that all happened with the  
10 recent iterations of the product within the last several  
11 years, and then the argument in the Michigan case. That  
12 story deserves to be decided by a finder of fact and not on  
13 a premature motion on summary judgment.

14 Now, with respect to claim preclusion and the  
15 Kessler Doctrine, with all due respect they are really  
16 trying to stretch those doctrines into something that just  
17 does not apply here. Those doctrines are limited to the  
18 same patent being asserted. They cite a case from the  
19 Southern District of California with very unique  
20 circumstances having no relevance here -- let me get to my  
21 notes here -- whereas the Kearns case and the Foster case  
22 from the Federal Circuit, not district courts, reminds us  
23 that claim preclusion requires the same claims in both  
24 cases, not some other patent. It also makes it clear that  
25 each patent is a separate cause of action.



1 With regard to the Kessler Doctrine --

2 THE COURT: Well, as I understand their position,  
3 they are not claiming that the same claim was made but that  
4 it should have been, could have been and should have been.

5 MR. LOBBIN: Right. I don't think that claim  
6 preclusion doctrine allows for the should have been theory.

7 THE COURT: Really?

8 MR. LOBBIN: Well, I think it requires --

9 THE COURT: We teach that in the first year of law  
10 school.

11 MR. LOBBIN: Well, if you read the cases that they  
12 have cited, they are limited to situations where the same  
13 patent was asserted against essentially the same product,  
14 not that the claim could have been made.

15 The Kessler Doctrine is limited to a situation  
16 where there is noninfringing status, and there are only two  
17 cases applying it so far, but where the accused product  
18 requires a noninfringing status vis-a-vis the patent.

19 Here, if you somehow accept from the summary  
20 judgment record that the products that we are accusing them  
21 of infringing are essentially the same as the products that  
22 were accused back then, the basis for noninfringement was  
23 the vacuum pump limitation of the 792 patent. So not only  
24 is it a new patent, but the basis for noninfringement is not  
25 relevant to anything that is going on here, because there is

1 no vacuum pump limitation in the 298 patent.

2 And then also for laches they have to establish  
3 that they were prejudiced, that they suffered prejudice by  
4 the fact that there was some delay, and that there is a  
5 nexus between that delay and the prejudice. On that issue  
6 certainly whether Hydro was prejudiced certainly should be  
7 subject to some testing on cross-examination.

8 For example, at trial you wouldn't have Hydro  
9 getting up to testify about all of the prejudice that they  
10 have suffered and have the jury listen to that, and then  
11 have me as opposing counsel not be foreclosed from  
12 cross-examining that witness to test what they are saying  
13 and those facts that they are asserting. Certainly with the  
14 motion that was filed we have not had an opportunity to do  
15 that. We didn't have the documents and we just started  
16 discovery. So how can you grant summary judgment when it is  
17 certainly not how a trial would proceed? It flies in the  
18 face of everything that the J.M.O.L. standard stands for.

19 Again, the 298 patent was never discussed. They  
20 make all sorts of implications about, well, Riveer must have  
21 known and they had the patent and they must have looked at  
22 it, they must have evaluated it, and they wanted to assert  
23 it against us, but there is no evidence that Riveer even  
24 brought it to their attention. I mean, it was raised as  
25 prior art in the Michigan case, but this is not a classic

1 laches situation where you write a letter and sit on your  
2 heels. That just didn't happen here. The 298 patent was  
3 sitting on the shelf at Riveer and somebody looked at it and  
4 decided it was not a clear case of infringement and didn't  
5 bring it forward.

6 THE COURT: On the 56(d) motion, do you want to  
7 address that and then we'll move on to the third --

8 MR. LOBBIN: Yes.

9 THE COURT: -- the third claim for relief.

10 MR. LOBBIN: I apologize for switching topics a  
11 little bit as we go through the discussion, but I have  
12 outlined some of the issues that at the time this motion was  
13 filed, Riveer had no discovery on and no opportunity to  
14 oppose the motion with evidence.

15 On laches we have got that there was an  
16 unreasonable delay, and that there was prejudice because of  
17 that delay suffered by Hydro, and so some of the discovery  
18 we need is we need to cross-examine Hydro. We need Hydro's  
19 documents that show what they thought of the delay and were  
20 they even thinking about the 298 patent. Mr. Miller stands  
21 up here and says, you know, that Hydro has been thinking  
22 since the early 2000s that they were free and clear of being  
23 sued on the 289 patent, but what evidence is there of that?  
24 What opportunity to cross-examine the Hydro witnesses have I  
25 had?

1           They mention in their papers that Riveer has had  
2 all of this evidence for all of this time and that the  
3 parties have been engaged in litigation in the past. These  
4 are different claims. There was a Michigan case where the  
5 parties conducted discovery in that time frame, but that is  
6 a long time ago. This case is with a new patent, three new  
7 patents, and the parties have exchanged documents relevant  
8 to those claims, so the prior discovery, even if it was  
9 available for use, is not relevant to these claims.

10           The second litigation the parties are engaged in  
11 is in this court with Judge Shelby, I believe, and that is a  
12 trade secret case. Hydro brought a claim against Riveer  
13 based on an employee who came from Hydro to Riveer. The  
14 discovery in that case, yes, there has been lots of  
15 documents produced and, yes, there has been lots of  
16 deposition testimony, but that does not mean that there is  
17 any relevance of that testimony to this case and there has  
18 not been.

19           For Hydro to suggest that these motions are not  
20 premature because we have been litigating for years, but --

21           THE COURT: Who is accusing whom of violating the  
22 trade secrets?

23           MR. LOBBIN: Hydro has accused my client, Riveer,  
24 in that case.

25           The issues of fact that are classically in a

1 laches determination are issues of fact for the jury, as  
2 well as for res judicata and the Kessler Doctrine in terms  
3 of assessing are these products essentially the same? Is  
4 this the same claim? Or have these products progressed and  
5 been redesigned through the years and we're looking at what  
6 is going on now as distinctly different, relevant to the  
7 claims at issue, than what came before?

8 THE COURT: I think that covers it.

9 MR. LOBBIN: Thank you, Your Honor.

10 THE COURT: Thank you.

11 Mr. Miller, are you ready to go with your next  
12 one?

13 As I'm looking at it, we're going to be discussing  
14 your motion for summary judgment on the third claim for  
15 relief.

16 MR. MILLER: I can, Your Honor.

17 THE COURT: If you wanted to respond to him at  
18 all, you can briefly, and then let's move on to --

19 MR. MILLER: Yes. I would like to respond to him,  
20 and I honestly think on the third claim for relief motion  
21 that it is so straightforward that I don't have a whole lot  
22 to say on it. I don't think that it is difficult to find  
23 that there is no offer for sale.

24 On the arguments Mr. Lobbin made, he kept talking  
25 about a story that the jury should hear, and everything that

1 he has said is a story, but I mean some of the stuff he said  
2 is so off base and misleading about what is going on that I  
3 have to correct it. He mentions these arguments in 2011 in  
4 Michigan and that that somehow gave Riveer this lightbulb of  
5 how they could argue infringement of their patent. Even if  
6 it is true, it does not justify starting the laches period  
7 over. Laches is not based on, now I understand how I could  
8 argue against that product, and it took me this long. Too  
9 bad. If it takes you that long, it is too long.

10 The arguments they are talking about are arguments  
11 we made about how to construe claim language in our patents  
12 to apply them to Riveer's products. That is irrelevant to  
13 the analysis you have to make to construe the terms in their  
14 patents to apply to our products. The law does not let you  
15 look at arguments about construing one patent with a  
16 different specification and a different invention and  
17 different inventors, and use that claim construction  
18 argument to support your arguments for infringement of a  
19 wholly separate patent from different inventors and  
20 different inventions. It is a mind-boggling argument that  
21 they make. It is apples and oranges.

22 He also kept saying that the 792 patent is  
23 broader. That means you draw a circle around it and this is  
24 everything that fits under the claims of the 792. If it is  
25 broader than the 298, and the 298 is a subset, and the

1 Michigan court found that Hydro falls outside of the 792,  
2 how can it possibly fall inside of the 298? That is the  
3 case we have here.

4 He tried to identify facts that would support it  
5 and he didn't identify any new facts. He tried to say,  
6 well, there are documents about the design history of their  
7 patents. There are, but those were attached to our motion  
8 for summary judgment. They are in the sealed exhibits that  
9 were filed with our motion, the entire design history. They  
10 have had those since May, so these are not new facts that  
11 suddenly they can now present. Those were the very first  
12 documents produced in the case.

13 The width of the rails issue -- when you have got  
14 a corrugated, angulated piece of steel, I don't know how  
15 anyone could find that the top part could be called a grate  
16 and the bottom channel can be called a bottom surface for  
17 the basin. It is crazy. Even if you want to go with their  
18 theory --

19 THE COURT: I thought that is what he said you  
20 argued to the Michigan court.

21 MR. MILLER: No, I didn't. Our argument to the  
22 Michigan --

23 THE COURT: Didn't he say that?

24 MR. MILLER: Yes, he did, but he is wrong. I  
25 mean, I never argued that.

1           The argument we made to the Michigan court is the  
2   impervious top limitation in our patent claims. The  
3   impervious top language talks about the top of the structure  
4   that sits on the support members. They had an impervious  
5   top. The court found that their redesign was still an  
6   impervious top. That is irrelevant to whether our  
7   corrugated thing can be construed to be four walls with a  
8   bottom surface that forms a basin and a grate. It is  
9   completely irrelevant.

10           It might have gotten Matt Petter thinking  
11   differently about how he could construe his patent claims,  
12   that is true, but if you accept that as true, just because  
13   it gave them a new idea does not justify a  
14   twelve-and-a-half-year delay. You're required to come up  
15   with your argument early on or face laches.

16           The width of the rails thing, they can't just say  
17   there were differences. They can't just say the width  
18   changed. They have to say that because of that change, here  
19   is the limitation in the claim language that is affected,  
20   and they can't. They say the grate. How is the grate  
21   different if the space between the openings in the grate is  
22   wider or more narrow? There is nothing in their patent that  
23   talks about the spacing of a grate. Nothing.

24           There is nothing to support the idea that because  
25   it was four inches between each valley and now it is two



1 inches between each valley, suddenly it is a grate now and  
2 it wasn't before. There is just nothing to support that  
3 concept.

4 THE COURT: It may not be that important, and just  
5 out of curiosity, did the Michigan court construe the  
6 meaning of the claim term grate?

7 MR. MILLER: No.

8 The claim term grate is not in the 792 patent.  
9 The Michigan court talked a lot about grates in the 298  
10 patent in the invalidity context to show that in the prior  
11 art you have a grate and in Hydro's patent you don't have a  
12 grate so there is no invalidity. There was a lot of talk  
13 about grates, but there wasn't claim construction on the  
14 term grate.

15 THE COURT: But the Michigan court found that the  
16 Hydro product didn't have a grate?

17 MR. MILLER: Well, in the --

18 THE COURT: Is that what you just said?

19 MR. MILLER: It is not talking about the Hydro  
20 product. It is talking about the patent.

21 THE COURT: I thought you just said that.

22 MR. MILLER: Yes.

23 THE COURT: I am just trying to understand what  
24 you just said.

25 MR. MILLER: The Michigan court said that Petter's

1 patent, which is prior art to Hydro's patent, discloses a  
2 grate.

3 THE COURT: Yes.

4 MR. MILLER: Hydro's patent, which depicts its  
5 early Hydropad, Hydro's patent claims don't require a grate.

6 THE COURT: Okay.

7 MR. MILLER: They require an impervious top. The  
8 court actually said that an impervious top is not a grate.  
9 They are different.

10 THE COURT: A grate is something that has openings  
11 in it that allows stuff to drop through it?

12 MR. MILLER: Into a basin. You can't look at the  
13 corrugations and look at the bottom of the little valleys in  
14 a corrugated piece of steel and say, well, each one of those  
15 valleys, we're going to call that the basin, and each one of  
16 the ridges we are going to call a grate.

17 THE COURT: I think that is what he said.

18 MR. MILLER: That is what he is trying to argue,  
19 but that argument applies equally to our wash pads from 2000  
20 to 2007 and to today. The spacing does not change the  
21 nature of their infringement argument. It is the same  
22 argument. It will fail on the merits, but it is not  
23 something that is new enough to justify a suit twelve and a  
24 half years after you know about our products.

25 The case law on that is clear. All of their

1       excuses, like I show in my chart there, as a matter of law  
2       you can accept everything that Matt Petter says in his  
3       excuses as true, and it does not provide a legally  
4       cognizable excuse.

5               THE COURT:   You want to submit the third claim on  
6       your brief?   Why don't you let me hear from --

7               MR. MILLER:   Unless you have any questions, Your  
8       Honor.

9               THE COURT:   Let me hear from Mr. Lobbin and then I  
10       will hear your response to him.   That would make it more  
11       efficient.

12              MR. MILLER:   The last thing I want to point out,  
13       Your Honor, if I may, is when it comes to case law on claim  
14       preclusion for claims that could have been brought, there  
15       are cases cited in the record where a patent infringement  
16       claim is precluded and it was not asserted in the first  
17       case, but the transactional facts at issue were the same.  
18       Even if the first case was just a trade secrets case and a  
19       trademark case or a contract case, a patent infringement  
20       claim later down the road has been precluded.   One of those  
21       cases is the --

22              THE COURT:   Aren't they in the brief?

23              MR. MILLER:   They are in the brief.   I believe  
24       they are in the briefing.

25              THE COURT:   Okay.

1 MR. MILLER: S.L.R. Partners and D-Beam, those two  
2 cases in our briefing both preclude patent infringement  
3 claims. One of them is a Federal Circuit case and one of  
4 them is a District Court case. They preclude patent  
5 infringement claims, even if the patent being asserted was  
6 never asserted in the first case.

7 THE COURT: Thank you.

8 Mr. Lobbin, could I ask you to address the third  
9 claim for relief?

10 MR. LOBBIN: Yes.

11 THE COURT: Then we'll let him respond to you. He  
12 says it is very straightforward.

13 MR. LOBBIN: Yes. I agree.

14 May I make a couple comments on what he said? I  
15 don't have to, but I would like to.

16 THE COURT: Well, if you want to I won't stop you,  
17 but let's be quick.

18 MR. LOBBIN: Okay. The Venn diagrams that he  
19 proposed -- I hate to say it this bluntly, but that would  
20 just lead to legal error. Just because the 792 is broader  
21 than the 298 does not mean that because the 792 is not  
22 infringed because there is no vacuum pump, that does not  
23 mean that the 298 can never be infringed.

24 The Venn diagram is not apropos. Why? Because  
25 the patents are directed to different inventions. It is

1 part of the same disclosure, and they are not prior art to  
2 each other, but that Venn diagram would just be legally  
3 erroneous. I'm surprised that he would make that argument.

4 THE COURT: What are you calling it?

5 MR. LOBBIN: Pardon?

6 THE COURT: What are you saying?

7 MR. LOBBIN: The diagram?

8 THE COURT: Venn?

9 MR. LOBBIN: The Venn, V-e-n-n, diagram. It is  
10 when you draw circles and there are circles inside of a  
11 circle.

12 THE COURT: I didn't know that word.

13 MR. LOBBIN: Yes. It is like --

14 THE COURT: How do you spell that?

15 MR. LOBBIN: V-e-n-n.

16 THE COURT: Okay. I didn't know that.

17 MR. LOBBIN: It is the engineering background that  
18 stuck with me all of these years.

19 THE COURT: Okay.

20 MR. LOBBIN: Hydro cites cases, a couple of cases,  
21 I think two, where a court found that, well, it does not  
22 have to be the same patent or the patent does not have to  
23 have been asserted in the prior action, but in those cases  
24 the facts were so specific and I, of course, invite the  
25 Court to read those closely.

1           For example, in the S.L.R. case, the plaintiff,  
2           the patentee admitted that the patent could have been  
3           brought. They admitted that there was infringement then and  
4           for whatever reason they decided not to raise the patent.  
5           Here we have a completely different story. There wasn't  
6           infringement then and we didn't raise the patent and we  
7           don't believe we could have raised the patent because of our  
8           belief at the time that it was not being infringed.

9           The next motion, you called it the third claim for  
10          relief, and I am not sure, but the issue is the on sale  
11          aspect of infringement. This deals with the 720 patent.  
12          The 720 patent is asserted by Riveer as having been  
13          infringed by Hydro in several aspects, and the only aspect  
14          that is at issue on this motion is Hydro's claim that even  
15          though they had a product that they had displayed on their  
16          Web site and during the period of infringement, no  
17          reasonable jury could ever conclude that those activities  
18          constituted an infringing offer for sale.

19          Now, under the Patent Act there are many different  
20          activities that could constitute infringement. You have the  
21          selling of an infringing product, the importing of an  
22          infringing product, using an infringing product, offering to  
23          sell the infringing product. So the basis for the claim or  
24          the basis for our opposition to the motion is that on the  
25          record, on the premature motion that they filed, number one,

1 we need more discovery, and specifically we need to  
2 cross-examine a witness from Hydro who is actually going to  
3 be held to their testimony and who has to prepare for the  
4 deposition to discuss how that advertisement and how that  
5 product was advised and how it was discussed with customers,  
6 what did customers request in response to that, what sales  
7 discussions were engaged in and were any sales consummated.

8 All of those issues you would expect at trial when  
9 a witness from Hydro gets up there and says, yeah, we  
10 advertised this product during the infringement period, but  
11 it can't be an offer to sell because we never sold any. It  
12 can't be an offer to sell because nobody seems to remember  
13 having that advertisement up on our Web site. It can't be  
14 an offer to sell because it does not have this term or that  
15 term or it does not say what the price is. At trial that  
16 testimony would be subject to cross-examination, and so on  
17 this motion it has to be subject to at least a deposition of  
18 Hydro to go into those facts.

19 Our position is, well, the Federal Circuit has a  
20 well developed -- fairly well developed body of law  
21 regarding what is or what is not an offer to sell.  
22 Basically in a nutshell the Federal Circuit has said, look,  
23 you have to file a U.C.C. We are not experts at contract  
24 law and the U.C.C. somewhat controls, and the U.C.C.  
25 basically says depending on the circumstances and what kind

1 of product is being sold, how the sales transactions  
2 normally take place, at what stage discussions constitute an  
3 offer to sell depends on what the product is and what that  
4 background is.

5 Here we don't have a bottle of shampoo where you  
6 walk into a store and have the price on it, okay, and it is  
7 being offered for sale. That is clear. Here we have  
8 custom, high priced wash racks that require significant  
9 customer-vendor interaction and the terms of the sale are  
10 discussed and bantered back and forth. This is all from the  
11 testimony of the one deposition that I had taken at the time  
12 of the motions, which was the vice president, Alan  
13 McCormick, from Hydro.

14 Again, this was an individual deposition and there  
15 was no preparation required and many questions he didn't  
16 know the answers to, and I didn't expect him to know the  
17 answers to everything because it wasn't a 30(b)(6)  
18 deposition. But the testimony that was garnered at the  
19 deposition confirmed that these are custom products, and  
20 here is how the sales cycle usually goes, and here is how we  
21 use our Web site. We have a very robust Web site and it is  
22 very important to our business, and we generate sales leads  
23 from customers oftentimes seeing what is on our Web and  
24 saying that they want something like that, calling us up and  
25 giving us a deposit, and we want to sell and we would be



1 happy to sell.

2 I asked him, I said, well, if one of your  
3 customers saw this image, and we had already established  
4 that that image was on their Web site during the infringing  
5 period, and I asked him, and I am paraphrasing, of course,  
6 if a customer saw this image and wanted to buy the product  
7 and called you up and gave you a deposit, or just called you  
8 up, would that customer be reasonable in concluding that the  
9 image on your Web site is an offer to sell this product? He  
10 said, yeah, that would be reasonable.

11 THE COURT: Wasn't he saying that they might have  
12 done that prior to the issuance of the 720 patent?

13 MR. LOBBIN: No, because I was telling him --

14 THE COURT: No?

15 MR. LOBBIN: No.

16 I was talking to him about the image that was off  
17 the Web site after the patent had issued. There was no  
18 limitation to that testimony. If that is the spin that they  
19 would like Your Honor to believe that that testimony is  
20 limited to, then all the more reason why we need to depose a  
21 30(b)(6) witness from Hydro, and we will, regarding what was  
22 reasonable or what was not reasonable for a customer to  
23 believe when and if a customer saw that image on their Web  
24 site after the time that the patent had issued.

25 If they think that they can somehow testify in

1 response to those questions that, no, it wouldn't have been  
2 reasonable for a customer to think that that was an offer to  
3 sell, but it would have been reasonable if it had been two  
4 years prior, with the same set of facts, that is just not  
5 credible. Certainly a jury has to be entitled to hear that  
6 testimony and decide for themselves, which is a classic  
7 issue of fact.

8 THE COURT: Do you have any evidence right now  
9 that Hydro offered this skid steer side trough for sale  
10 after the issuance of the 720 patent, any evidence?

11 MR. LOBBIN: Yes. The Web site image as well as  
12 his testimony.

13 THE COURT: The one that they didn't take down and  
14 that they say was inadvertently left up, and that is your  
15 sole basis for believing that there was something that  
16 qualifies as an offer for sale under the statute?

17 MR. LOBBIN: That is right. That is the basis at  
18 the time of this motion, yes. We still have not gotten  
19 testimony about -- because Mr. McCormick didn't know --

20 THE COURT: I am wondering what you think entitles  
21 you to testimony. What is it that allows a plaintiff to get  
22 into court so that they can require a 30(b)(6) witness to  
23 talk about something? You say that is enough to get you  
24 through the door, the discovery door, right?

25 MR. LOBBIN: Well --

1 THE COURT: You don't have evidence of anything  
2 being asked to be made that would infringe. All you have is  
3 this one Web site piece of information that existed until  
4 this deposition was taken, and then they took it down  
5 immediately, and that is all that you have, right?

6 MR. LOBBIN: Well, yes, but --

7 THE COURT: That does not get you through the  
8 discovery door, and I'm just wondering why you think that is  
9 enough when we have the definition we have. We have courts  
10 defining the term offer for sale as they have since the  
11 Patent Act was written in, whatever it was, '94.

12 MR. LOBBIN: I guess I am not quite sure --

13 THE COURT: It is a simple question. That is all  
14 that you have got. You think if you allege that in a claim  
15 for relief in your second amended complaint, that that  
16 allows you to require them to bring in witnesses, including  
17 a 30(b)(6) witness, so that you can explore everything that  
18 ever happened in their company with regard to that one  
19 little blurb of information that remained up on the Web  
20 site?

21 MR. LOBBIN: Well, we don't know whether it was  
22 that one little blurb or not.

23 THE COURT: That is all that you know about.

24 MR. LOBBIN: Yes. We filed a lawsuit based on the  
25 information that we knew. We didn't know that that was a

1 mistake. The witness didn't even know that.

2 THE COURT: Maybe I am not making my question  
3 clear. You think that is enough to allow a plaintiff, under  
4 the current Rules of Civil Procedure, to get into court and  
5 open that discovery door?

6 MR. LOBBIN: Yes.

7 There is no challenge to the pleadings so, you  
8 know, in my experience courts usually require -- not  
9 require, but recommend that the parties start discovery  
10 before there has been --

11 THE COURT: I guess that is my question. What  
12 let's you get into the other party's files and their people  
13 and ask a lot of questions that cost a lot of money, and you  
14 can do it just because you find out there is this one Web  
15 site piece of information that you think might possibly get  
16 you -- they didn't file a Rule 12(b)(6) on this, and I'm  
17 kind of wondering why they didn't, but they preferred to  
18 come forward with a motion with summary judgment after you  
19 had deposed their knowledgeable vice president, and he gave  
20 you what you have got, and you think that that gives you the  
21 right to move on to further discovery. I understand that,  
22 I'm just wondering why.

23 MR. LOBBIN: I think that is the nature of our  
24 litigation system. The pleading was not challenged and we  
25 are entitled to discovery that we can rely on. Yes, we had

1 a witness who postulated some things about what may or may  
2 not have been the source of this or what may or may not have  
3 been up when, and --

4 THE COURT: He told you in that deposition that  
5 once the 702 patent was issued, that they thought they had  
6 taken everything off any Web site, and he said before the  
7 720 patent, as I understand it, issued, that, yes, they  
8 would have been happy to make this for a customer if a  
9 customer had responded to what they put up on their Web site  
10 and said we would like to make this device. He acknowledges  
11 that.

12 He tells you in his deposition that we didn't sell  
13 any. They certainly didn't sell any. Did anybody ask you  
14 to make one? No, not to my knowledge. He is the vice  
15 president of whatever. Oh, there still is this thing up on  
16 the Web site, but we are going to take that down  
17 immediately.

18 That is enough, you think, to go into a 30(b)(6)  
19 deposition, and these other people you want to fish around  
20 with and see if there was some possibility that some person  
21 out there acted on what you claim is an offer to sell --

22 MR. LOBBIN: Well, Your Honor --

23 THE COURT: -- after the patent was issued?

24 MR. LOBBIN: I respectfully disagree with any  
25 characterization of what I'm doing as fishing around. I

1 take my obligations very seriously as a member of the bar --

2 THE COURT: I am not suggesting that you don't.

3 MR. LOBBIN: -- and I believe that if I file a  
4 pleading that is not challenged, I have an obligation to my  
5 client to nail down the evidence, that if I'm going to  
6 dismiss a claim I better be damn well sure that there is no  
7 basis for the claim that hasn't been challenged and that I  
8 have pled it appropriately, the pleading hasn't been  
9 challenged, and I have an unprepared witness who postulates  
10 a few things. I apologize for having to catch my breath  
11 here, but --

12 THE COURT: I am not impugning --

13 MR. LOBBIN: I apologize for having to catch my  
14 breath here, but I have to be honest, Your Honor, that we  
15 believe in full disclosure, and we don't believe in expense  
16 litigation, and we have certainly not engaged in any -- we  
17 are not trying to gin up the fees. They filed this crazy  
18 motion and I suppose they could have just asked us to  
19 dismiss the claim. They never asked us to dismiss the  
20 claim.

21 I mean, if Your Honor is correct and they wrote me  
22 a letter saying what basis do you think that you have to  
23 take a 30(b)(6) deposition after you took the deposition of  
24 Alan McCormick, and you better dismiss this claim, well,  
25 then maybe I would have dismissed the claim. Maybe I would

1 have talked to my client and said, you know, I think it is  
2 my obligation to see and explore some testimony that I can  
3 count on as admissions of Hydro, rather than just relying on  
4 Mr. McCormick who knows some things but does not know other  
5 things.

6 I honestly think, and I am sitting here today  
7 thinking back on what I would have done, but I don't think  
8 it would have served my client to let the claim go just  
9 based on what this person said in an unprepared deposition.

10 THE COURT: I have not ruled yet, and I am just --

11 MR. LOBBIN: I feel like I'm being sort of --

12 THE COURT: You are being asked what I wonder  
13 about as a general proposition, and certainly you are not  
14 unusual or uncommon in seeking discovery, and it is an  
15 interesting system that we have, and you know it as well as  
16 I do that there are those times where an aggressive  
17 plaintiff is fully entitled to get through that discovery  
18 door and maybe there are reasons that the door shouldn't be  
19 opened. That is all I was asking.

20 I deal with these things so often, and I will  
21 admit that this is kind of a close question. You have got  
22 what you have got. Is it enough to allow you to pursue  
23 further what people in their company knew based on what you  
24 got from Mr. McCormick? I can see that you say that there  
25 are other people that might know more than he did, but --

1 MR. LOBBIN: Well, he specifically referenced in  
2 his deposition others who were intimately involved with the  
3 Web site and the sales process and a gentleman who is  
4 interested in selling these products. I hear you about the  
5 discovery door, and I suppose I thought the door was at the  
6 pleading stage, and maybe I didn't know that I had to come  
7 back and ask to take a 30(b)(6). I thought I would just  
8 notice it up.

9 THE COURT: Well, no, it is a summary judgment  
10 motion so we are beyond the 12(b)(6). You have got what you  
11 have got, and this is unusual unlike anything else we are  
12 dealing with, because you did get information directly from  
13 a guy who seemed to know, and I don't know who they  
14 designated as the 30(b)(6) if it was not him, and he can't  
15 make up new facts, so I'll bet you get him again if they  
16 designated a 30(b)(6), but I don't know --

17 MR. LOBBIN: I realize that sort of the  
18 progression of discovery in this case is a little unorthodox  
19 and being the plaintiff it is frustrating, because as a  
20 plaintiff you want document production and you want to read  
21 the documents, right, and you want to figure out who you  
22 need to depose and then go depose them.

23 It probably wouldn't serve my client and is maybe  
24 not the best practice to take depositions before I have  
25 10,000 pages of documents, because I am not going to get



1 those people again and I didn't have the documents I need.

2 We are at the stage now at the end of discovery  
3 where we have got the depositions scheduled, and I have got  
4 a deposition scheduled of a 30(b)(6) witness from them, and  
5 I have got a deposition scheduled of the two gentlemen who  
6 were more intimately involved in the sales activities,  
7 according to Mr. McCormick's testimony and, so,  
8 unfortunately, I can't stand here and tell you what I have  
9 got. What I have got is what we have.

10 THE COURT: What you have got is what you have  
11 got.

12 MR. LOBBIN: What I have got is what I have got.

13 What I am saying is I am entitled to -- I have  
14 been at this game long enough to know that you take one  
15 person's deposition that is not prepared and you get a lot  
16 of hemming and hawing, and then you take somebody else's  
17 deposition who is more knowledgable and maybe is prepared,  
18 and all of a sudden you get a whole treasure trove -- you  
19 get a whole set of clarifying information with specifics,  
20 rather than, well, I don't know what happened with that.  
21 Maybe we got calls and maybe we did this or maybe we did  
22 that.

23 Had summary judgment been granted against you  
24 before you had the opportunity to take that deposition,  
25 well, it seems like it wouldn't have been appropriate.

1 THE COURT: Okay. Well, thank you very much.

2 MR. LOBBIN: Thank you, Your Honor.

3 THE COURT: We have been going almost two hours.

4 Do you want to take a break?

5 Did you want to say anything in response, let me  
6 first ask on this motion, and then we'll take a break?

7 MR. MILLER: Okay.

8 Your Honor, first off, he keeps mentioning  
9 something being displayed on our Web site during the period  
10 of infringement. There was never an image displayed on our  
11 Web site during the period of infringement, ever. The only  
12 thing that --

13 THE COURT: During the period of alleged  
14 infringement?

15 MR. MILLER: In other words, after the patent  
16 issued.

17 THE COURT: Okay.

18 MR. MILLER: Okay. Nothing was ever on our Web  
19 site displaying this product after the patent issued. What  
20 there was was a link. It didn't say side trough wash pad  
21 and it didn't say anything that would indicate the product,  
22 but if you clicked a link, it took you to a different Web  
23 site, the P.R. Web site, and it took you to a 2011 press  
24 release saying this is a new product. That is all it said.

25 THE COURT: I understand all of that.

1           MR. MILLER: He admits that is all that he has  
2 got. Then he keeps saying that Mr. McCormick was an  
3 unprepared witness and that he is hemming and hawing. I  
4 think that that is a disingenuous characterization of that  
5 deposition. He never was equivocal on the key question of  
6 did you ever sell this? Did anybody ever call and ask about  
7 it? He was not equivocal on that stuff. He mentioned other  
8 people that worked on the Web site and helped him do that  
9 because he is not a Web site guru, but there is nothing in  
10 that testimony that would give anybody a reasonable belief  
11 that there may be some sales or offers for sale that  
12 happened after the patent issued. Nothing.

13           He also says that we never asked him to withdraw  
14 this claim. That is just not accurate. I sent him multiple  
15 e-mails and letters saying I don't think this qualifies for  
16 a Rule 11 pleading. The thing they cited in their complaint  
17 was actually a Web site that they had to get off the  
18 Internet from the way back machine on the Internet archive.  
19 They had to go back in time and get something that was dated  
20 prior to the patent. That is what they used as evidence in  
21 their complaint of infringement.

22           I mean, that is facially a violation of Rule 11.  
23 You don't have a reasonable basis to believe something  
24 infringed the patent, when the only evidence that you have  
25 predates the patent. I told them many times withdraw this

1 claim. It is a bogus claim. Well, we are entitled to  
2 discovery. Okay. They take discovery and we have multiple  
3 affidavits in the transfer proceedings in California of more  
4 than one witness that says we never sold this ever. We  
5 never ever sold this.

6 Then he deposes the person most knowledgeable  
7 about the product line, Alan McCormick, and he still refuses  
8 to withdraw the claim. He claims that this stray image on  
9 somebody else's Web site in a 2007 press release could  
10 possibly constitute an offer for sale. I think that is  
11 unbelievable. This part of their claim needs to be  
12 dismissed.

13 THE COURT: Did you want to say anything in  
14 response to that? You can, and then we'll take a break.

15 MR. LOBBIN: Only that there is nothing  
16 disingenuous about what I'm saying. My statements here to  
17 the Court are based on my recollection of the testimony  
18 after reviewing it and preparing for this hearing. I think  
19 the Court is well able to determine what are stretches of  
20 the truth and what are characterizations made by an  
21 advocate. In contrast to the Venn diagram display, you  
22 know, which I think was over the top, my representations are  
23 not disingenuous.

24 THE COURT: I am sure they are not.

25 Let's take about a ten-minute recess. When we

1 come back I will hear argument on the motion -- I assume you  
2 want argument on the motion regarding the fourth, fifth and  
3 sixth claims for relief. I will hear that.

4 That is the last one, isn't it?

5 MR. MILLER: That will be it.

6 THE COURT: Then I will hear whatever you are  
7 prepared to address on your pending motion regarding claim  
8 construction. Then we'll be done.

9 Allow me to run up to my chambers, and if we can  
10 start back in at 10 minutes after 1:00, then we'll wrap this  
11 up.

12 Court is in recess.

13 (Recess)

14 THE COURT: I have five criminal matters coming on  
15 for hearing at 2:00, so if we could be done by then, that  
16 would be appreciated by the Court. If we can't, they can  
17 obviously wait until we're ready for them, but I think that  
18 should give us enough time.

19 Mr. Miller, you're up.

20 MR. MILLER: Thank you, Your Honor.

21 On this motion really the things I want to point  
22 out are that this motion highlights two sales transactions,  
23 and these are the only sales transactions they plead in  
24 their complaint. In our opinion they are the only two sales  
25 transactions that can be at issue in these claims. The law

1 says that if the fundamental premise of any claim, whether  
2 it is a required element of the claim or not, if it is a  
3 false statement or misrepresentation, then you have to plead  
4 it under Rule 9 enough to let people know what the false  
5 statement is and who made it, the who, what, when and why of  
6 the false statement. Okay.

7 I don't even think that they meet that in this  
8 pleading on these two sales transactions, but we're going on  
9 summary judgment here on these two sales transactions and we  
10 have provided all of the documents for these sales  
11 transactions and the testimony and they still have not  
12 identified a false statement that Hydro made to the Army  
13 that misrepresented their equipment somehow. They still  
14 have not done that.

15 They rely heavily on Rule 56(d) to oppose this  
16 motion. Like I pointed out earlier in the case law, you  
17 can't rely on Rule 56(d) by supposition and, well, we should  
18 be able to fish around all of their competitive bids and see  
19 if we can find a false statement. That is not permissible  
20 in these types of claims. We have to know what you think  
21 the false statement is, just to get into the discovery door,  
22 but we gave them all the documents anyway.

23 They are not specific enough when they are talking  
24 about what facts they think they'll find in discovery. If  
25 you look at Mr. Lobbin's declaration that he files with

1 their opposition at page 8, and this is how he talks about  
2 it, he says the probable facts which will be gleaned from  
3 the requested discovery include the factual detail to  
4 support and confirm Riveer's allegations, including, and  
5 then all he does is quote their kind of vanilla allegations  
6 in the complaint that Hydro's misrepresentations concerning  
7 bid specifications prejudiced Riveer. They don't say that  
8 there is a specific fact or a certain person or a certain  
9 document is going to show that Hydro said X and X is  
10 actually false. They don't do that anywhere.

11 They admit that all of these claims fall if they  
12 can't prove a false or misleading statement. They admit  
13 that that is required for every one of these claims. They  
14 admit that on page 5 of their opposition brief. They agree  
15 with our statement of the elements, and then the only place  
16 where they really give their theory, the only theory they  
17 have in this case on these claims, is they try to say that  
18 the equipment Hydro provided is not exactly what the  
19 specifications in the Army's or military's solicitation  
20 requested. That is not a misrepresentation. We're talking  
21 about government bidding here, competitive bidding, and the  
22 government issues a solicitation that says we're looking for  
23 this equipment and here are the specifications.

24 We have testimony from Matt and Doug Petter where  
25 they admit that it is not uncommon to propose something that

1 is not exactly what the Army requests. You propose the  
2 equipment that you have and the Army gets to decide if that  
3 is good enough. It may not be exactly to our  
4 specifications, but is it good enough? They can choose  
5 something that is not the exact specification. The only way  
6 these claims can stand is if they point to something Hydro  
7 says about Hydro's equipment that turns out to be false and  
8 is not what Hydro provided. They don't have any evidence to  
9 support that. They have not identified a single alleged  
10 false statement about Hydro's equipment. They just want to  
11 say that if you propose something that is not exactly the  
12 specification of the military bid, that it is an inherently  
13 misleading statement and that is not true.

14 There is just no evidence of a misleading  
15 statement. It is kind of hard to argue this motion. We are  
16 at the end of discovery here and I still don't have a  
17 representation from them that says here is a statement that  
18 was false from Hydro. We still don't have that anywhere in  
19 the record. I think the motion has to be granted and these  
20 claims dismissed.

21 THE COURT: Thank you.

22 Mr. Lobbin, please.

23 MR. LOBBIN: Thank you, Your Honor.

24 So, again, another example of a classic fact issue  
25 that the jury has to be able to decide. The claims are



1 fairly accurately characterized by Mr. Miller. These  
2 companies compete for government and other entities'  
3 contracts. Requests for bids go out and the requests  
4 provide very detailed specifications and the companies bid  
5 on those specifications.

6 Inherent in that process is that the bid submitted  
7 is compliant with the specifications. A false statement or  
8 a misrepresentation can be, you know, hey, we don't meet the  
9 specification, or, you know, we do meet the specification  
10 requirement for stainless steel products but providing a  
11 plastic product, or maybe not saying that they provide a  
12 plastic product when they actually in fact do. Well, that  
13 would be a false statement.

14 A misrepresentation would be the specification  
15 requires stainless steel and, you know, we comply with that  
16 even though in the end the product ends up having some other  
17 construction. Those are misleading statements. The  
18 government relies on the bidders to state accurately as  
19 meeting the specifications, and these government contracting  
20 agents are not necessarily engineers, and they don't go out  
21 and inspect the product. They don't fly out to Utah and  
22 inspect the product. They rely on the bid to be accurate as  
23 meeting the specifications, and if it is not, there has been  
24 a misrepresentation.

25 As you would expect, particularly with the

1 government contractors, the bids are often awarded to the  
2 lowest priced bidder, and so Hydro has gained an advantage  
3 and caused damages to Riveer by providing low bids in  
4 response to government requests that have exacting  
5 specifications when they don't meet those specifications.

6 THE COURT: Could you tell me what exactly the  
7 misrepresentation was, the misstatement? I understand your  
8 broad theory, but just not complying with the bid  
9 specification alone does not get us to an actual  
10 misrepresentation. It may be a breach of contract or  
11 something else, but we need to have something that was  
12 deceptive, false or misleading.

13 MR. LOBBIN: In the declaration in docket number  
14 106 we filed from Matt Petter, who is sitting here with me,  
15 he goes through in paragraphs 3, 4, 5 and 6 the  
16 misrepresentations concerning the V.C.I. bid, the Marine  
17 Corps bid, and then in 7 the misrepresentations concerning  
18 the Army's bid at Barstow, for example.

19 THE COURT: Read 7 and 8 to me. This is the Army  
20 bid. Read it just verbatim.

21 MR. LOBBIN: Concerning the Army bid  
22 specifications as set forth in Hydro's Exhibit M, the  
23 specifications require a system including many material  
24 features, including a high traction nonslip surface, two  
25 center mud collection troughs, a 24-inch-wide and

1 four-inch-deep custom drag conveyor, low profile deck, wedge  
2 wire screen filter, a final absolute polishing filter, a  
3 heavy duty ozone injection odor control, water recovery via  
4 diaphragm pumps, and climate controlled I.S.O. container  
5 able to operate off the grid.

6 The deficiencies of Hydro's system offered as  
7 satisfying these bid specifications are discussed fully in  
8 Exhibit M. The deficiencies were never substantively  
9 addressed by Hydro or the Army during the evaluation  
10 process. As such, the substantive evaluation of these  
11 aspects of Hydro's bid is necessary to determine whether  
12 Hydro misrepresented the features and capabilities of its  
13 system offered in response to these bid specifications,  
14 which is the purpose and the basis for Riveer's allegations  
15 in this action concerning the Army bid.

16 THE COURT: You don't know of any actual  
17 misstatement or misrepresentation, you just think from the  
18 fact that the bid specifications were not honored by what  
19 you think Hydro delivered that there may have been  
20 misrepresentations along the way?

21 MR. LOBBIN: Correct.

22 We know what the specification requires and we  
23 know what Hydro's products are and so there is a mismatch.  
24 It was either represented as complying with the  
25 specifications, in which case it didn't, or it was

1 represented as off the specification and somehow approved.

2 So with a witness from Hydro explaining what  
3 actually happened from their perspective, and testimony from  
4 the contracting office saying if they evaluated the bid and  
5 how they evaluated the bid, and whether these were  
6 misrepresentations or whether these were somehow after the  
7 fact waivers of the specification requirements for the  
8 purpose of getting to that low bid and accepting it, and  
9 those are all issues that go into whether this was an eyes  
10 wide open exception to the specifications as Hydro contends,  
11 or whether this was a look the other way or just, you know,  
12 frankly the press of business on the part of the government  
13 to say, well, we put out the specs and they bid on it so  
14 they obviously think they meet the specs and they have the  
15 low price so they get the contract.

16 If that is the case, and there were  
17 misrepresentations that were not brought to the attention of  
18 the government or didn't come to the attention of the  
19 contracting office based on their own process, then that  
20 substantiates the claim for misrepresentation and unfair  
21 competition that we claim has damaged Riveer in both  
22 instances.

23 Counsel mentions Rule 9(b), and I just wanted to  
24 address that briefly. We briefed this issue in our briefs.  
25 9(b) is a pleading rule. They never raised Rule 9(b) at the

1 pleading stage. They are trying to use Rule 9(b) to  
2 constrain the scope of our claim and constrain the scope of  
3 discovery. I understand why they are doing it, it is just  
4 not proper. The cases cited in our brief point out just  
5 that fact. Rule 9(b) is there to ensure that the pleadings  
6 are pled in accordance thereof, and if there is a challenge  
7 to the pleading, then you cite Rule 9(b) and file a motion  
8 and the Court will rule on it.

9 Now we are in discovery and the pleadings have  
10 been made. The scope of discovery under the federal rules  
11 includes broadly the scope of Riveer's claim, which, as  
12 revealed in the discovery that we have asked for, and the  
13 third parties that we have discussed the testimony with, is  
14 significantly broader.

15 THE COURT: It seems like --

16 MR. LOBBIN: I think that issue is a red herring,  
17 the Rule 9(b) issue.

18 The fact remains that in their motion all they  
19 have addressed is the Marine Corps bid and the Army bid.  
20 That is really all that we have before the Court, frankly,  
21 on the motion.

22 On those two issues, besides what Mr. Petter says  
23 in his declaration, which must be credited in a light most  
24 favorable to Riveer, and besides the discovery that we need  
25 from Hydro, in other words a witness that we can get

1 testimony from on behalf of the company as to what exactly  
2 they were doing in making these bids not in compliance with  
3 the specifications, to confirm perhaps the admissions that,  
4 yeah, they were standing on one foot and holding one eye  
5 open hoping that the government wouldn't catch on, and  
6 testimony from the contracting officer to say, well, how do  
7 we feel about these bids?

8           From our experience in this business, and not me  
9 personally, but from our clients' experience in the  
10 business, these are contracting officers and they are not  
11 engineers, and they are not evaluating the products and they  
12 are not looking at the products and they are not saying,  
13 okay, the specification 47 requires an eight-inch-diameter  
14 stainless steel -- rated for this rating and before we award  
15 this bid, let's go look and see if Hydro's product does  
16 that. No, they don't do that. They don't have the  
17 capability to do that. What they do is they rely on the  
18 bidders to present accurate bids in compliance with the  
19 specifications and the low bidder usually wins.

20           So at trial we're going to need to, and we will,  
21 get that testimony and we will present a full picture of the  
22 issues. I think that although we are the plaintiffs in the  
23 case, and I know that the plaintiffs, their feet get put to  
24 the fire on summary judgment, and in general with raising  
25 claims, you know, everyone likes to resolve cases, but I

1 think the theme and what I'm getting from all of the  
2 objections from Hydro throughout this case, not only to  
3 early summary judgment motions, to waiting six months to  
4 produce documents, threatening not to produce documents and  
5 then all of a sudden producing them once I threaten a motion  
6 to compel, this is just not the way litigation is supposed  
7 to be conducted if both parties are interested in getting to  
8 the truth, which is I think what the process is about.

9 We are not trying to increase fees for anybody.  
10 We are just trying to raise claims that were not challenged  
11 on our pleadings, and we're trying to get what we need to  
12 get to the truth, and we are trying to present those issues  
13 before a fact finder. I would just offer that as sort of an  
14 overall theme of kind of how we have approached this  
15 litigation, and all of the litigation between these parties.

16 The Michigan case was raised by Hydro. We filed a  
17 defense suit, but it was really Hydro's case against Riveer.  
18 Then Hydro sues us here in Utah on this trade secret  
19 allegation. We really have been on our heels with the  
20 history of the litigation between these two parties, and I  
21 just didn't want the Court to get the wrong impression of us  
22 being some sort of overbearing aggressor and being  
23 ridiculous and overreaching in trying to get this discovery  
24 that has no relevance to the case. We just want to get to  
25 the truth.

1 THE COURT: Thank you.

2 Mr. Miller.

3 MR. MILLER: Your Honor, with regard to these two  
4 bid transactions, we are at the truth. All of the written  
5 communications exchanged between Hydro and the military are  
6 in the record. They still have not identified where a  
7 misrepresentation is. All they say is Matt Petter's  
8 declaration, you can credit it as true, but all he says is,  
9 hey, what they provided does not exactly match up with the  
10 original specification. What he does not say is what they  
11 provided is not what they represented they would provide.  
12 That is what he does not say, because that is not accurate.

13 It seems like their entire claim here is based on  
14 this assumption that all of the contracting officers in the  
15 Marines and Army are just Gomer Pyle, and they just sit  
16 there, and if somebody bids they just assume, well, that is  
17 probably exactly the specification and I am not smart enough  
18 to figure it out. That is not how the system works.

19 We have quoted Matt Petter and Doug Petter  
20 admitting that it is not uncommon to submit a bid for a  
21 product that does not comply with the specifications,  
22 because the specifications are drafted usually to fit  
23 exactly somebody's system. One of these at issue is --  
24 Riveer makes a product and they submit their specifications  
25 and the Army uses that specification to put the bid out for



1 others, but the Army will accept equivalence and something  
2 that will do it just as good without meeting every single  
3 specification. That is why there is this bidding process  
4 with the contracting officer looking through it.

5           You'll see in one of the story lines, and I don't  
6 remember if it is the Army one or the B.C.I. bid, but in one  
7 of the story lines the contracting officer responded to all  
8 four bidders and said resubmit your bids. Three of them are  
9 just not close enough and are deficient. One of them is too  
10 high of a price. They know what they are doing. They  
11 compare them. You are not misleading anyone by submitting a  
12 bid that may not have everything in the bid specification.  
13 That is why there is a protest system. That fact pattern  
14 that we have in this motion shows that Riveer protested both  
15 of these. The Marines took a second look and they asked  
16 more questions. They came to their own independent  
17 conclusion that what Hydro was offering is good enough for  
18 them.

19           What they are not doing in this case is pointing  
20 to something in Hydro's bid that says we'll provide you with  
21 this whatever component, and then evidence that shows Hydro  
22 did not provide them with that component. They have not  
23 identified that type of a misrepresentation anywhere. It is  
24 all supposition. At least for these two sales transactions,  
25 summary judgment is warranted and they have no evidence to

1     rely on.

2             THE COURT:   Well, these are the only two at issue,  
3     aren't they?

4             MR. MILLER:   In our opinion, yes.

5             If they wanted to raise more they would have to  
6     justify amending their complaint to raise these -- in their  
7     request for document production they talk about a bid with a  
8     customer named Catch Can, and they talk about Kellogg and  
9     Brown and they talk about Fort Riley and all these other  
10    ones, and we don't know what they are talking about and we  
11    don't know why they are raising them.   We have produced all  
12    of those documents now, and if they fish through those and  
13    they want to find a misrepresentation, well, then they are  
14    going to have to justify amending their complaint to raise  
15    it and then pursue that claim.

16            I think their claim begins and ends on these two  
17    sales transactions and they can't win.   There is a policy  
18    argument to consider here.   You have the military doing a  
19    competitive bid process to get equipment.   They have their  
20    own independent protest system which Riveer uses and Hydro  
21    uses.   All of these competitors use this protest system.  
22    Then the military resolves the protest and they can choose  
23    whether something is important to them in the specification  
24    or whether an equivalent would be enough.

25            What you're going to create here is you protest a

1 bid with the military, and if you lose the protest then you  
2 get to run to court and call it false advertising because  
3 what they are providing is not exactly what is in the spec.  
4 You have to have a real misrepresentation and they don't  
5 have that here.

6 THE COURT: It is not in your brief, but even if  
7 there was a false representation made by Hydro to the Army  
8 in seeking a contract from the Army and winning the bid,  
9 does the other bidder have standing to bring a Lanham Act  
10 false advertising claim?

11 MR. MILLER: Well --

12 THE COURT: You don't address it in your brief,  
13 but it was just a curiosity that I have.

14 MR. MILLER: It is a good thought and there is a  
15 good argument that they wouldn't, because the whole purpose  
16 of the Lanham Act and false advertising is to protect the  
17 consumer, the public and the customer.

18 Now, if the military wanted to sue Hydro because  
19 they got a piece of equipment, and then they go back to  
20 Hydro and say you said it was going to have this type of  
21 final filter or this type of basket on it and that is not  
22 what we got, then maybe they could get a false advertising  
23 claim there because they are the damaged party. I don't  
24 know if Riveer would have standing.

25 THE COURT: Well, if the allegation was that they

1 had misrepresented something about your product, if Hydro  
2 misrepresented something about Riveer's products, and I have  
3 never heard of a case like this asserting intentional  
4 interference with economic relations by breaching a  
5 contract, which is essentially what they are arguing, with  
6 the Army. I don't know about the Unfair Trade Practices Act  
7 either and whether it envisioned a competitor having the  
8 standing to bring the lawsuit.

9 MR. MILLER: Well, it is --

10 THE COURT: You didn't address it in your brief  
11 and it is unfair for me to just throw it out there.

12 MR. MILLER: It is a wild fact pattern to have  
13 them arguing about something that is really something  
14 between Hydro and the Army. They don't claim they have  
15 misrepresented anything about Riveer's products. Riveer's  
16 real gripe here is they want everybody to propose the exact  
17 system they are proposing on these bids. That is not the  
18 requirement.

19 The Army does not expect everybody to have the  
20 exact same components. Riveer can't force everyone to  
21 propose the exact same equipment that they are proposing.  
22 They can't demand that through a lawsuit on such specious  
23 claims. We think this one should be granted, and we don't  
24 think that, honestly, even if they try to find something  
25 with these other sales, which I have not heard anything

1 about yet, we don't think leave to amend would be justified.

2 THE COURT: Thank you, Mr. Miller.

3 MR. MILLER: Do you want to talk about claim  
4 construction or --

5 THE COURT: I want to hear his response to your  
6 comments first.

7 MR. MILLER: Okay.

8 THE COURT: Mr. Lobbin.

9 MR. LOBBIN: Thank you, Your Honor.

10 He keeps asking for what the misrepresentations  
11 were and we have talked generally and I have not been going  
12 over my brief in chapter and verse with you here, and just  
13 discussing it more conceptually, but pages 27 through the  
14 end of our brief expands on what the specific  
15 misrepresentations are.

16 For example, at the top of page 27, citing some of  
17 their exhibits, it talks about communications between Hydro  
18 and the contracting office, and confirming in writing that  
19 Hydro's bid satisfied the bid specifications, providing  
20 stainless steel filtration components and other features.  
21 That is a misrepresentation. We know what their products  
22 are and they are not that.

23 THE COURT: Go back through that one again. You  
24 said the top of 27?

25 MR. LOBBIN: I'm sorry. Page 27 of our brief.

1 THE COURT: Yes. Tell me again what it is that  
2 they misrepresented.

3 MR. LOBBIN: Line 2 starts, for example, regarding  
4 the Marine Corps B.C.I. bid, and there was some back and  
5 forth from the Marine Corps to Hydro saying, well, wait a  
6 minute. We need to confirm that your bid actually satisfies  
7 the specifications.

8 THE COURT: That is Hydro providing confirmation  
9 that its bid satisfied the bid specifications requiring  
10 stainless steel filtration components and other features.

11 MR. LOBBIN: Correct.

12 THE COURT: I see.

13 MR. LOBBIN: That is their motion at 14 and 15 and  
14 citing Exhibit 4.

15 THE COURT: Right.

16 MR. LOBBIN: And then the Marine Corps  
17 correspondence is Exhibits C, D and F.

18 So Hydro's evidence that they satisfied the  
19 requirements is a letter from the contracting officer who  
20 specifically took what Hydro told her and repeated it as  
21 necessary as her assurance that, yes, Hydro has told me that  
22 they satisfy these bid specifications. I am taking them at  
23 their word. Therefore, we conclude that Hydro does satisfy  
24 these bid specifications.

25 Then my brief continues. In order to confirm that

1 Hydro's product, the actual product delivered to the Marine  
2 Corps was not what they represented it to be, Riveer needs  
3 discovery. Of course, that was six months ago and we have  
4 been getting documents from Hydro ever since and they  
5 finally completed the production last week, and we'll be  
6 able to present testimony at trial to confirm that the  
7 product actually delivered did not meet the representations  
8 that they were making to the Marine Corps.

9 THE COURT: Did not meet the representations that  
10 they were making or did not meet the bid specifications or  
11 is it the same thing?

12 MR. LOBBIN: Same thing.

13 THE COURT: Well, that is what I just don't know.  
14 Again, to open up this discovery door, don't you have to  
15 show me something where you know of a representation in a  
16 letter or an oral statement or a document of some kind where  
17 a misrepresentation has been made, a material  
18 misrepresentation?

19 MR. LOBBIN: Well, here they are saying we have  
20 stainless steel filtration components. That is what I just  
21 read. At the top of page 27 they are talking about assuring  
22 the Marine Corps that they have the required specified  
23 stainless steel filtration components.

24 THE COURT: Right.

25 MR. LOBBIN: We know that they don't. That is

1 from I think Petter's declaration and from what we have  
2 learned since, and we would be prepared to supplement that,  
3 if the Court would invite further briefing on the issue to  
4 show where the genuine issues of material fact are at this  
5 stage of the game because, as Mr. Miller admits, they filed  
6 a motion with documents that we had never seen before.

7 THE COURT: Mr. Miller, tell me how you respond to  
8 this. He is claiming that it was a misrepresentation that  
9 they satisfy the bid specifications requiring stainless  
10 steel filtration components because they didn't.

11 MR. MILLER: Your Honor, this is what he is  
12 referring to. Exhibit D of our motion is an e-mail from the  
13 military to Mr. Felice at Hydro Engineering proposing a  
14 bunch of questions. The questions say are you using an  
15 ozone injection system? Does your product offer stainless  
16 final filters? There are a few questions there.

17 Exhibit E is the letter that Hydro sent back.  
18 Hydro's letter responds to each question. Yes, Hydro will  
19 be providing an electrically generated Corona discharge  
20 ozone injection. Number two. Yes, our system offers a  
21 stainless final filter which is easy to visually inspect and  
22 clean. Number three. Yes, our system offers stainless  
23 steel filtration systems. Our primary filter is all  
24 stainless steel. Those are their representations.

25 Hydro has testified that everything they state in



1 this letter they provided to the military. They provided  
2 them a stainless steel final filter. They provided them all  
3 that stuff.

4 Now, it might not be the exact same stainless  
5 steel final filter that Riveer provided them, but they  
6 represented what they would provide them in this letter and  
7 that is what they provided. There is no evidence to the  
8 contrary.

9 THE COURT: Tell me what your evidence is to the  
10 contrary.

11 MR. LOBBIN: Well, we have Mr. Petter's  
12 declaration, and Mr. Petter is here and I am sure he would  
13 be glad to explain it in gory detail, not that that is the  
14 purpose of this hearing, but he explains in paragraph 5 how  
15 we have pictures of the actual product delivered to the  
16 Marine Corps which show that the system included all sorts  
17 of things that were sub the specifications, including,  
18 contrary to their representations, stainless steel  
19 components.

20 The system included, and I am reading from his  
21 declaration, Hydro's system included mostly less expensive  
22 P.V.C., which is hard plastic, construction rather than the  
23 stainless steel construction required by the specifications.

24 THE COURT: How do you respond to that, Mr.  
25 Miller?

1 MR. MILLER: Your Honor, I am looking at paragraph  
2 5 in Matt Petter's declaration that he cited. This says  
3 Hydro's system included mostly less expensive P.V.C.  
4 construction. Well, what does that mean? He is not saying  
5 that there was no stainless steel in our construction. He  
6 is not saying that our statement that we would offer a  
7 stainless steel filter is false. He is saying that we had  
8 P.V.C. Where did we represent that our system would not  
9 have P.V.C. in it? I mean, that is kind of a weird  
10 statement to say there. All systems have some P.V.C. in  
11 them.

12 A media filter with a maximum P.S.I. rating of  
13 only 60. Where did we say in this letter that we would  
14 provide a media filter with a maximum P.S.I. rating of 60?  
15 We didn't. Then he says the capacity of only 300 pounds of  
16 media rather than the 750 pounds required. Where did we say  
17 that we would provide more than the 300 pounds of media?  
18 This is assuming that Mr. Petter's representations here in  
19 paragraph 5 are accurate about what we gave to the military.

20 THE COURT: Going back to the stainless steel  
21 filtration components, has Mr. Petter anywhere indicated  
22 that they did not deliver a stainless steel filtration  
23 component?

24 MR. LOBBIN: I think what he means by that and  
25 what his testimony is is that the bid required and they

1 confirmed, you know, again from the brief at 27 and the  
2 evidence cited therein, that Hydro confirmed and the Marine  
3 Corps accepted that Hydro satisfied the bid specifications  
4 requiring stainless steel filtration components, and the  
5 characterization that Mr. Petter has made in his declaration  
6 shows that, no --

7 THE COURT: Shows what?

8 MR. LOBBIN: No. Sorry. I was being dramatic.  
9 I'm sorry. I was leading in with a no --

10 THE COURT: I understand.

11 MR. LOBBIN: No, they actually provided not a  
12 stainless steel filtration system.

13 THE COURT: He does not say that anywhere, does  
14 he?

15 MR. LOBBIN: Well, he says that the Hydro system  
16 had mostly less expensive P.V.C. construction, not stainless  
17 steel.

18 THE COURT: That does not say they failed to  
19 provide the stainless steel filtration components.

20 MR. LOBBIN: Well, P.V.C. is not stainless steel.  
21 That is the import of the testimony.

22 THE COURT: I don't think there is any dispute  
23 about that. Somebody needs to tell me that they  
24 misrepresented something, that they said they were providing  
25 and offering to provide stainless steel filtration

1 components and told that to the Army, even assuming that you  
2 have standing to bring it up, which really in some ways  
3 surprises me, and it is between the Army and Hydro it seems  
4 to me. Otherwise we would have bidders on every contract  
5 that gets bid in the world every day complaining if the  
6 other person won the contract and they can prove that all of  
7 their specifications didn't meet the bid specifications, so  
8 there must have been a misrepresentation so we can sue them  
9 under the Lanham Act because they took the bid away from us.  
10 That may be the law, but it would surprise me if it is.

11           Going back to this specific point, and I am just  
12 asking you, and when I ask for contrary evidence, it would  
13 be something that shows that Hydro did not provide the  
14 stainless steel filtration components.

15           MR. LOBBIN: I suppose my evidence at the time  
16 this motion was filed was Mr. Petter's photographs and  
17 testimony about the fact that rather than a stainless steel  
18 filtration system, they --

19           THE COURT: Rather than, and it does not say that,  
20 it says it was mostly P.V.C. The irony here is I may be  
21 getting more representation from you and Mr. Petter than  
22 you're accusing them of.

23           MR. LOBBIN: Well, I --

24           THE COURT: It is not that hard. I am willing to  
25 let you go past this motion, and especially since they are

1 not raising the standing issue, but if you can show me where  
2 you have some basis to allege that they told the Army this  
3 and they didn't do what they said they were doing.

4 MR. LOBBIN: Well, I suppose, without conferring  
5 with my client, which I could do, what I'm left with is what  
6 is in the record. What is in the record are the  
7 communications between the Marine Corps and Hydro where they  
8 say, yeah, we meet the bid specifications requiring  
9 stainless steel filtration components, and Mr. Petter  
10 saying, well, we saw what they delivered, and maybe they  
11 should have taken out the word mostly, but the effect of his  
12 testimony is what they gave the Marine Corps was not  
13 stainless steel.

14 THE COURT: That is what he does not say. That is  
15 what he never says.

16 MR. LOBBIN: Well, he says rather than the  
17 stainless steel construction required --

18 THE COURT: Does it say rather than?

19 MR. LOBBIN: Yes.

20 THE COURT: You're quoting from the document?

21 MR. LOBBIN: From Petter's declaration.

22 THE COURT: Okay.

23 MR. LOBBIN: He says rather than --

24 THE COURT: Well, that is closer, Mr. Miller.

25 I don't have it in front of me. That would have

1       been easier. If he says rather than -- that is still a  
2       little ways away.

3               MR. LOBBIN: Well, it says --

4               THE COURT: Mr. Petter, do you claim to know that  
5       Hydro, your competitor, did not provide stainless steel  
6       filtration components?

7               MR. PETTER: The key word there is components.  
8       The government says are you providing a stainless steel  
9       filtration and final filter. That is what they asked. They  
10      replied we are providing stainless steel filter components.  
11      They have a paper bed media filter that has a stainless  
12      steel shell around it. The rest of their system is plastic.  
13      So they didn't lie, but they didn't answer the question  
14      accurately.

15              THE COURT: Thank you.

16              That is the basis for your misrepresentation  
17      claims --

18              MR. LOBBIN: Yes.

19              THE COURT: -- that support all three causes of  
20      action or claims, as you call them, four, five and six?

21              MR. LOBBIN: Yes. Correct.

22              With regard to the Army, the discussion there is  
23      at the bottom of 27 and at the top of 28. The bases for  
24      that claim are discussed in Mr. Petter's declaration, the  
25      last paragraphs, but also Exhibit M which details in chapter

1 and verse the substance and components that were represented  
2 as satisfying the bid specifications but were not  
3 satisfactory. That is a protest letter.

4 Now, again, those are just the two bids that they  
5 challenge. At trial we'll present other examples that we  
6 have fleshed out in discovery. There is always a balance.  
7 You want to plead what you know and then there are other  
8 instances of this same conduct that have revealed themselves  
9 through the discovery we have been able to garner from the  
10 documents that they have produced and our testimony that we  
11 have obtained from the third parties that were actually  
12 contracting these services and can testify as to what was  
13 misrepresented and what was delivered.

14 THE COURT: Thank you, Mr. Lobbin.

15 Mr. Miller, anything from you?

16 MR. MILLER: One quick thing.

17 On that last bid and when they talk about Exhibit  
18 M, that is a protest letter Petter put together on that bid  
19 just talking about Petter's opinion on what was wrong with  
20 awarding it to Hydro. That protest was not granted. The  
21 only protest that was granted was a supplemental protest  
22 that had to deal with additional communications. It was not  
23 granted on the fact that our bid didn't satisfy the  
24 specifications.

25 They are not pointing to evidence of a

1 misrepresentation. They are pointing to evidence of their  
2 protest, which was not granted.

3 THE COURT: What do you say to my question to Mr.  
4 Petter and his answer to it where he seems to be saying that  
5 he could add some more information in his declaration or his  
6 affidavit and say, well, my position is that they  
7 misrepresented to the Army by using this broader word  
8 component that they were going to deliver more stainless  
9 steel than they did? I may be paraphrasing it wrongly, but  
10 that is what I took from what he said. You heard it as  
11 well.

12 Is that enough to allow them to proceed to the  
13 further discovery that they want?

14 MR. MILLER: No, I don't believe it is.

15 THE COURT: Why not?

16 MR. MILLER: He didn't say that they lied. He  
17 said they didn't lie.

18 THE COURT: He said they misrepresented.

19 MR. MILLER: He said the wrong question was asked.

20 THE COURT: You can misrepresent something by not  
21 telling the whole truth.

22 MR. MILLER: The Army's question is do you provide  
23 a stainless steel final filter? They said, yes, we do.  
24 They provided a stainless steel final filter. Maybe it has  
25 less stainless steel than Riveer's final filter, but there



1 is nothing in the Army's question that would require Hydro  
2 to answer that any differently. If they have evidence to  
3 show what this final filter is and what the Army thought  
4 that meant, that is one thing, but they don't.

5 The discovery of third parties is done. They  
6 can't depose any of these military people. They have waited  
7 and you have ruled on that. The discovery cutoff date is  
8 December 1st. They don't have time to give anybody  
9 reasonable notice for depositions. After last week's  
10 ruling, they hurried up and tried to serve a bunch of  
11 depositions to try to get seven depositions in six different  
12 states to occur on the same day. I mean, that is just an  
13 admission that they know it is unreasonable and the  
14 subpoenas are not reasonable.

15 They don't have evidence to support the idea of a  
16 misrepresentation here. Even if you give his theory some  
17 credence, it does not rise to the level of a false  
18 advertising claim. It just does not. You have to have the  
19 evidence. You can't have an unfounded opinion that I think  
20 it means this and they should have answered it this way.

21 THE COURT: Thank you.

22 Now, where are we on the last matter?

23 MR. LOBBIN: May I make one very small comment  
24 very quickly?

25 THE COURT: Sure you can.

1 MR. LOBBIN: I just want to clarify, because I  
2 know we have talked a lot today about getting through the  
3 door, and you mentioned just recently whether Riveer is  
4 entitled to more discovery, but in opposition to the summary  
5 judgment motions, we are not asking for more discovery. We  
6 are asking for the summary judgment motions to be denied on  
7 the basis of 56(d) because they are premature and, as the  
8 rules of judgment, as a matter of law, require, Riveer has  
9 not been fully heard on the issue.

10 We are not necessarily asking for the Court to  
11 rule that we are or are not allowed to take certain or other  
12 discovery. We can go about that as a matter of course in  
13 the case without the Judge's involvement. Our opposition  
14 and the Rule 56 motion are in support of our argument that  
15 the summary judgment motions should be denied on the basis  
16 that they are premature under the J.M.O.L. rules and Rule  
17 56(d).

18 THE COURT: Thank you.

19 Now, on the remaining matter, this claim  
20 construction issue, is it something that you're ready to  
21 present or talk about today or not?

22 MR. LOBBIN: No. Not us, Your Honor. I'm sorry.

23 MR. MILLER: Your Honor, we are.

24 I was under the impression that they would have  
25 filed an opposition by now, given our discussion last week

1 at the hearing, but it is something that is time sensitive.

2 THE COURT: Why is it that you chose not to  
3 respond since our last hearing?

4 MR. LOBBIN: Your Honor, I have tried to put it  
5 together and I have been preparing for this hearing. I was  
6 traveling all day yesterday. I have been in communication  
7 with Mr. Miller and there is just a lot to say in response  
8 and I have just not completed the response. I know that the  
9 local rules give us 14 days, and I am about halfway through  
10 the brief, and I could probably get it filed at the pleasure  
11 of Your Honor.

12 THE COURT: Thank you.

13 As I understand it from what I have read from the  
14 submissions by the defendants, the defendants have filed  
15 their final contentions pursuant to local patent Rule 4.1,  
16 correct? You're complaining that their submission is not  
17 compliant, right?

18 MR. LOBBIN: Correct.

19 THE COURT: I will say this, that from what I have  
20 read, Mr. Lobbin, and I'll give you some time to submit a  
21 brief, but I'm going to ask for it to be done soon. From  
22 what I have read so far, my strong inclination is that you  
23 are not even close to being in compliance with the letter or  
24 the spirit of the rule. It anticipates that each side gets  
25 to understand what the other side is advancing by way of the

1 claims that need to be construed and the claim construction  
2 that they are offering. I am just giving you my best  
3 warning.

4 MR. LOBBIN: Sure. I can comment on that, if you  
5 would like.

6 THE COURT: I would be glad to hear you.

7 MR. LOBBIN: Yes. A lot of local rules require  
8 claim construction --

9 THE COURT: And this one is fairly new.

10 MR. LOBBIN: Yes.

11 THE COURT: We have not had it very long.

12 MR. LOBBIN: I understand.

13 Part of the reason it has taken me time on the  
14 response, and there are so many cases I want to bring to  
15 this Court's attention where the parties have issues that  
16 they want construed, and they are all issues that only one  
17 side wants construed. The other side, typically the  
18 plaintiff, views their patent as stating claim terms that  
19 are normal words, adjacent, grate --

20 THE COURT: It sounds like we might need grate  
21 construed.

22 MR. LOBBIN: You might think.

23 In claim construction rulings from district courts  
24 for the last 15 years, there are probably 25 of them that I  
25 am planning to put in our brief. The court goes through

1 each claim term and says, okay, the plaintiff's position on  
2 claim construction, no construction necessary. The  
3 defendant's position on claim construction, the word  
4 adjacent means blah, blah, blah, and 42 words to define  
5 adjacent. The same thing with grate. That is basically  
6 where we are in this case.

7 It is a valid position for a plaintiff to say,  
8 Your Honor, on the construction of this term our position is  
9 that no construction is necessary. I'll cite all of the  
10 cases, many, many cases where the court says, you know what,  
11 the defendant wants sort of this long-winded constricting  
12 construction of this word that really does not need  
13 construction, and so I'm going to rule in favor of the  
14 plaintiff on this one and say no construction is necessary.

15 That is a legitimate position and that is the  
16 position we take, and if Your Honor is inclined, and I take  
17 your comments seriously, and if you really think I am  
18 swimming uphill and you're going to grant the motion or want  
19 me to do something, I am more than happy to adopt a  
20 compromised position which says that I'll file a brief, an  
21 opening claim construction brief, but I can tell you right  
22 now what it is going to say is the word grate is a grate.  
23 Everyone knows what a grate is. The jury knows what a grate  
24 it. There is no construction necessary for the word grate.

25 Similarly with the word adjacent, the jury should

1 know and everybody knows what adjacent means. We are  
2 dealing with the English language. It is not with  
3 mathematical precision, but patent law excepts the fact that  
4 a word like adjacent used in a patent claim can be presented  
5 to the jury and the jury gets to decide, okay, I know what  
6 adjacent means. In the accused product this is adjacent to  
7 this.

8           You have not told them, well, adjacent means that  
9 it can be near or next to or within 20 inches, but not  
10 further away than 72 inches. No. You get to trial and you  
11 tell the jury that adjacent means adjacent. Those are our  
12 positions.

13           I can file a brief that says that. It won't take  
14 long. It would probably take me longer to do the opposition  
15 to this motion than to present an opening claim construction  
16 brief that says -- I think we are at eight or nine terms  
17 that they have raised, so here is what we think they should  
18 mean, and here is why our position is legitimate, and the  
19 case law is replete with rulings that say no construction  
20 necessary.

21           THE COURT: Are you adjacent to Mr. Miller right  
22 now?

23           MR. LOBBIN: I am.

24           THE COURT: How about to me?

25           MR. LOBBIN: I am not.

1           THE COURT: We could probably debate that. That  
2     is quite an interesting thing. I just think in my  
3     experience these words that the parties are going to have a  
4     difference of opinion on, the words that make up the claims,  
5     that you need to know what the other side says they mean.  
6     You tell me in the brief that you submitted or the  
7     contention that you submitted to them, I guess, that I don't  
8     need to construe them beyond their ordinary and customary  
9     meaning.

10           Well, then tell them what you think that ordinary  
11    and customary meaning is. It all is relative to what a  
12    person of ordinary skill in the art would think that  
13    ordinary meaning is. I don't know why this is a problem, I  
14    don't.

15           MR. LOBBIN: Well, I'll tell you why it is a  
16    problem.

17           THE COURT: This would be like two football teams  
18    and we decide we are going to let them change game plans  
19    beforehand, and say it is a bad rule, but one team complies  
20    with the rule and sends over what they are going to run on  
21    Saturday, and the other team says we have decided not to.  
22    Everybody kind of knows what football is and we are not  
23    going to do that. That strikes me as the sort of argument  
24    you're making here.

25           I will tell you this, that I will let you not

1     construe them, but on everything that you don't construe or  
2     offer a construction on that you think needs to be  
3     construed, and they give me a construction, I will adopt  
4     theirs.

5             MR. LOBBIN: Well, no, because we are entitled to  
6     oppose their constructions with evidence that says that  
7     their construction is not --

8             THE COURT: All we're asking for now is an  
9     exchange.

10            MR. LOBBIN: Okay.

11            THE COURT: Exchange the claim construction, the  
12     terms you feel need to be construed and what construction  
13     you think they should be given.

14            MR. LOBBIN: Okay. If I may, I think I can flag  
15     sort of the issue. I mean, in my experience in this case  
16     they try to sort of prevent things and strike things, and so  
17     I think the concern is that they want me to not only file a  
18     brief that says grate means grate and adjacent means  
19     adjacent, but they want me to come up with some cobbled  
20     together definition that I don't really advocate, but --

21            THE COURT: I only want the definition that you  
22     advocate.

23            MR. LOBBIN: Okay. Then the next step is going to  
24     be when I file an opposition to their claim construction  
25     motion, and I have all sorts of reasons why their



1 constructions are not accurate, and I submit an expert  
2 declaration saying what the person of ordinary skill in the  
3 art would think about what they are proposing, they are  
4 going to say, no, we are going to strike that expert  
5 declaration because you didn't file that expert declaration  
6 in your opening brief.

7 If Your Honor is willing to consider that issue  
8 and give me an indication of whether that is going to be  
9 something I should worry about, I would be more than happy  
10 to compromise and file the opening brief and the positions  
11 that I take.

12 THE COURT: I just want you to follow the two  
13 rules and they are pretty simple. We'll deal with other  
14 matters down the road. I am not giving you an advisory  
15 opinion about whether some argument they make later is  
16 outside the rules. The rule is pretty simple and you need  
17 to follow it. It is simple.

18 If you want to oppose their motion, which is a  
19 motion -- how did they style it -- a motion to compel  
20 plaintiffs to comply with local patent Rules 4.1 and 4.2,  
21 that is still a pending motion and I'm going to need a brief  
22 by next Tuesday at 5:00. You have the option of opposing  
23 their motion and telling me why, and then they can respond  
24 with a reply or tell me they don't want to reply. You have  
25 that opportunity.

1           You also have the opportunity to just comply with  
2     the rule as it is written and provide, rather than this  
3     thing you have provided, which gives me no claim  
4     construction requests, and it only says plain and ordinary  
5     meaning, and if you think these things are going to be  
6     construed pursuant to their ordinary and customary meaning,  
7     well, then, tell me what that is.

8           MR. LOBBIN: Understood.

9           THE COURT: It is up to you. You can dispense  
10    with fighting their motion and conceding and --

11          MR. LOBBIN: That is not an option.

12          THE COURT: -- do whatever you want, or you can  
13    give them your submission and then we'll follow Rule 4.2 for  
14    a simultaneous brief exchange.

15          MR. LOBBIN: Thank you, Your Honor.

16          THE COURT: All right. Thank you.

17          I will take all of these other motions under  
18    advisement.

19          Thank you.

20          (Proceedings concluded.)

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